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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Colorado
Case Nos. 94SA48 and 94SA128

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QUESTION PRESENTED

Whether a popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violates a fundamental right of independently identifiable, yet non-suspect, classes to seek such special protections.

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Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Colorado
Case Nos. 94SA48 and 94SA128

The Governor of the State of Colorado, and the State of Colorado petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado in this case.

OPINIONS BELOW

The opinions of the Colorado Supreme Court (Pet. App. B and D) are reported at ___ P.2d ___ (Colo. 1994) and 854 P.2d 1270 (Colo. 1993), respectively. The opinions of the trial court (Pet. App. C and E) are not reported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. The opinion of the Colorado Supreme Court was issued on October 11, 1994, and modified on November 7, 1994. The mandate of the Colorado Supreme Court (Pet. App. A) was entered on November 14, 1994.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article II, § 30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

STATEMENT OF THE CASE

A. Course of Proceedings

This case involves the validity of a state constitutional amendment prohibiting state and local governmental entities from enacting, adopting or enforcing any law or policy providing special legal protections for homosexuals and bisexuals. This provision, popularly known in Colorado as "Amendment 2,"[1] was passed at the general election held November 3, 1992. On November 12, 1992, the Respondents instituted an action in state district court under 42 U.S.C. § 1983, claiming that Amendment 2 facially violated several provisions of the federal constitution. Upon motions filed by the Respondents, the trial court on January 15, 1993 preliminarily enjoined the Petitioners from enforcing Amendment 2.

On July 19, 1993, the Colorado Supreme Court affirmed the issuance of the preliminary injunction. *Evans v. Romer*, 93SA17, *reported at* 854 P.2d 1270, 1286 (Colo. 1993) ("*Evans I*") (Pet. App. D). The Colorado Supreme Court held that Amendment 2 presumptively violated "an independently identifiable group's" "right to participate equally in the political process," protected by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Accordingly, the court below remanded the matter for a trial on whether the provision was narrowly tailored to achieve a compelling governmental interest.[2]

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[1]The Colorado Revisor of Statutes renumbered this provision as art. II, § 30b for "ease of location." Colo. Rev. Stat., Vol. 1A (1994 Supp.).

[2]The Petitioners sought certiorari after the Colorado Supreme Court's initial decision. No. 93-453 (U.S. S. Ct. filed Sept. 17, 1993). The Respondents then argued that the matter was not final, and this Court denied review on November 1, 1993. *Romer v. Evans*, 114 S. Ct. 419 (1993). There is no question that the judgment of the Colorado Supreme Court is now final.

Trial was held on October 12-22, 1993. At trial, the Petitioners presented evidence and argument concerning several compelling state interests supporting Amendment 2.[3] On December 14, 1993, the trial court ruled that although Amendment 2 promoted two compelling interests -- religious freedom and familial privacy -- it was nonetheless infirm because it was not narrowly drawn to achieve those purposes in the least restrictive manner possible. Pet. App. C-14.[4]

The Colorado Supreme Court reaffirmed its holding that Amendment 2 is subject to strict scrutiny review, and affirmed the trial court's determination that Amendment 2 violated the federal constitution. *Evans v. Romer*, 94SA48 and 94SA128, (Colo. Oct. 11, 1994) ("*Evans II*") (Pet. App. B). Accordingly, it entered final judgment permanently enjoining the enforcement of Amendment 2.

B. Statement of Facts

At the time Amendment 2 was proposed, a number of governmental entities in Colorado had granted or were actively considering granting special legal protections to homosexuals and bisexuals: three cities (Denver, Boulder, and Aspen) had enacted ordinances prohibiting discrimination based on sexual orientation in

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[3]These interests included (1) deterrence of factionalism through preempting local laws; (2) preventing governmental interference with personal, familial, and religious privacy; (3) preserving the integrity of the State's political functions; (4) preserving the ability of the State to remedy discrimination against suspect classes; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) preserving individual autonomy on issues of moral concern.

[4]On February 4, 1994, the Petitioners filed a Notice of Appeal with the Colorado Supreme Court. On February 9, 1994, the trial court certified its December 14 order as appealable under Colo. R. Civ. Pro. 54(b). On March 25, the Petitioners filed an additional Notice of Appeal regarding the February 9 order, and the two appeals were consolidated.

jobs, housing, and public accommodations; the Colorado Civil Rights Commission had voted to recommend that the General Assembly extend the State's civil rights act to ban discrimination based upon sexual orientation; the Governor had issued an executive order prohibiting job discrimination for state classified employees based on sexual orientation; at least two state colleges had policies prohibiting discrimination based on sexual orientation; and the Colorado General Assembly had enacted a statute prohibiting health insurance companies from determining insurability based on one's sexual orientation.[5]

The sponsors of Amendment 2 -- a Colorado Springs-based group known as Colorado for Family Values ("CFV") -- were concerned that special legal protections for homosexuals and bisexuals diminished the privacy, associational, religious, and economic liberty interests of others. Moreover, granting special protections for homosexuals and bisexuals also would raise serious questions about, among other things, the future of educational policy in the state and, ultimately, the State's official approval of homosexuality as a legitimate, alternative lifestyle. Thus, Amendment 2 was intended to prevent homosexuals and bisexuals from receiving preferred legal status; it was not intended to eliminate all legal rights for homosexuals and bisexuals, much less to protect those who broke the law by threatening or harming homosexuals and bisexuals. (v. 15, pp. 722, 837, 846, 853, 868).

The political campaign over Amendment 2 was characterized by competing claims of "equal rights" versus "special rights." CFV claimed that the extension of antidiscrimination laws to include sexual orientation would be tantamount to granting special rights, which are not enjoyed by the public at large. Amendment 2 faced significant opposition, including many prominent political figures, the Colorado

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[5]Legislative Council of the Colorado General Assembly, *An Analysis of 1992 Ballot Proposals*, Research Publ. No. 369 (1992) (Pet. App. F).

Civil Rights Commission, the American Civil Liberties Union, the League of Women Voters, at least 300 Denver area religious leaders, and most of the newspapers in the State. Denver area newspapers and television stations refused to run some of CFV's advertisements, and Amendment 2's opponents out-spent its supporters by a nearly 2-1 margin. Nonetheless, the people approved Amendment 2 by a margin of 813,966 to 710,151 votes (53.4%- 46.6%).

C. Colorado Supreme Court Opinions

The Colorado Supreme Court determined that Amendment 2 not only repealed existing special protections for homosexuals and bisexuals, but also prohibited "any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." *Evans I* (Pet. App. D-25). Consequently, the court found, both initially and ultimately, that Amendment 2 infringed upon a "fundamental right to participate equally in the political process." *Evans II* (Pet. App. B-3) (quoting *Evans I*, Pet. App. D-21).

The essence of this "fundamental right," the court below determined, was that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process, absent a compelling state interest." Pet. App. D-14. That "right" was infringed here, the court concluded, because (1) "[p]rior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation," *id.* at D-27; and (2) Amendment 2 "bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." *Id.* at D-25.

The trial court rejected the Respondents' contention that homosexuals and bisexuals are a suspect or quasi-suspect class. Pet. App. C-19. The Respondents did not appeal that holding to the Colorado Supreme Court. Accordingly, the question of the legal status of homosexuals and bisexuals *as a class* under the Equal Protection Clause is not before this Court. Rather, the only issue is the validity of the "independently identifiable group" theory adopted by the court below.

The court below rested its decision upon three separate lines of authority concerning (1) the people's ability to restructure political processes (*e.g.*, *Hunter v. Erickson*, 393 U.S. 385 (1969)), (2) the right to vote, (*e.g.*, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gordon v. Lance*, 403 U.S. 1 (1971)), and (3) candidate eligibility (*e.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)).

In dissent, Justice William H. Erickson argued that the majority had blurred "fundamental rights" cases with "suspect class" cases to create a heretofore unknown federally-mandated group-based fundamental right. Justice Erickson found that this Court's decisions refute the existence of a fundamental right of any independently identifiable group to participate equally in the political process. Rather, he said, this Court's cases support strict scrutiny review only where a suspect class is adversely affected by a restructuring of the political process. Pet. App. D-55. Justice Erickson took the majority to task because it had "crafted a new fundamental right that had never been recognized by the United States Supreme Court or by any court other than a federal district court in Ohio that relied on *Evans I*. Ironically, judicial review of Amendment 2 has accomplished exactly what the voters who passed Amendment 2 sought to prevent -- the

majority has effectively created a heightened protection for homosexuals, lesbians, and bisexuals." Pet. App. B-36.[6]

REASONS FOR GRANTING THE PETITION

There are few issues as divisive as the standing of homosexuals and bisexuals in American society. However, the creation of new constitutional "rights" in response to socially worrisome issues necessarily leads to unforeseen collateral problems when they are applied to other settings. The Colorado Supreme Court's holding places into constitutional doubt any attempt by state or federal governments to preempt countervailing social policies favored by lesser political units. This profound departure from existing constitutional theory, coupled with its dramatic potential impact upon self-government, provide a compelling basis for this Court to review the decision of the Colorado Supreme Court.

I. THE COLORADO SUPREME COURT'S DECISION IS CONTRARY TO THIS COURT'S DECISIONS IN *HUNTER v. ERICKSON*, *JAMES v. VALTIERRA*, AND *WASHINGTON v. SEATTLE SCHOOL DISTRICT*, AND WILL REVOLUTIONIZE EQUAL PROTECTION JURISPRUDENCE

As the basis for its conclusion that "any identifiable group" possesses a fundamental right to seek enactment of local legislation benefitting it, the Colorado Supreme Court disavowed reliance upon sexual orientation as the basis for a "suspect class" and instead purported to apply a line of cases commencing with *Hunter* v.

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[6]Justice Erickson found that the appropriate standard of review under the Equal Protection Clause is the rational basis test, and further concluded that Amendment 2 easily satisfies this test. Pet. App. at B-53.

Erickson, 393 U.S. 385 (1969). The court's holding, however, conflicts with *Hunter* and the cases of this Court that authoritatively construe it: Under those cases, the Equal Protection Clause prohibits only efforts to realign the political process in a manner designed to harm a suspect class. Decisions of other courts have also held that *Hunter* and related cases are limited in this manner.

In *Hunter*, this Court reviewed an amendment to a city charter which repealed a racial anti-discrimination ordinance, and required voter approval before that type of ordinance could be put into effect. The Court made quite clear that the amendment was struck down because the city council alone could no longer enact such measures on behalf of racial minorities. Characterizing the amendment as placing "special burdens on racial minorities within the governmental process," 393 U.S. at 391, this Court observed:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are 'constitutionally suspect' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications.

Id. at 391-92 (citations omitted).

Two years later, this Court unequivocally refused to extend *Hunter* to non-suspect classes. *James v. Valtierra*, 402 U.S. 137 (1971), concerned the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low income housing projects without prior approval by a majority vote in a city, town, or county referendum. A lower court had ruled, based on its reading of *Hunter*, that the California measure unconstitutionally discriminated against poor people in the exercise of their right to seek redress from governmental authorities. This Court disagreed, finding that, unlike in *Hunter*,

> it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' . . . *The present case could be affirmed only by extending Hunter, and this we decline to do.* [Respondents] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective, when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But, of course, a law-making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably, a State would not be able to require referendums on any subject, unless referendums were required on all, because they would always disadvantage some group.

Id. at 141-42 (1971) (emphasis supplied).

Eleven years after *Valtierra*, this Court invalidated a voter-initiated statute which removed the power of school boards to order busing to desegregate schools in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). However, this Court acknowledged that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action." It is only "when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process" that a different analysis is required. *Id.* at 470 (emphasis in original). Indeed, the majority underscored that the core of this line of cases is:

> [W]hen the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental

> action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.' In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'

Id. at 486 (citations omitted).

Thus, *Hunter*, *Valtierra*, and *Seattle School District* call for strict scrutiny *only* when the political process has been restructured to place unusual burdens upon racial groups or other suspect classes -- "those groups . . . relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Seattle School District*, 458 U.S. at 486; *see also Valtierra*, 402 U.S. at 141-42. The case is, therefore, this simple: the *Hunter* rule comes into play *only* to protect members of a suspect class. And the Colorado Supreme Court did not conclude, nor do the Respondents contend, that Amendment 2 affects members of a suspect class. In conflict with the Colorado Supreme Court, various other courts have confirmed that *Hunter*, *Valtierra*, and *Seattle School District* are confined in this manner.[7]

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[7]*See, e.g., Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) (characterizing *Hunter* as striking "down a city charter amendment requiring voter approval of certain antidiscrimination ordinances on the ground that the amendment created a classification based on race"); *Lee v. Nyquist*, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) ("The principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."); *cf. Arthur v. City of Toledo*, 782 F.2d 565, 571-74 (6th Cir. 1986) (*Hunter*, *Valtierra*, and *Seattle School Dist.* reflect prohibition of racial discrimination); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4th Dist. 1991)

The Colorado Supreme Court claimed support for its decision from cases such as *Reynolds v. Sims*, 377 U.S. 533 (1964), *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969), and *Gordon v. Lance*, 403 U.S. 1 (1971). Each of these cases concerns the fundamental right to vote, not the "right" identified by the court below. *Reynolds v. Sims* stands for the proposition that the right to vote, read together with the Equal Protection Clause, requires the representation of like numbers of people, rather than geographic areas. *Kramer v. Union Free School Dist.* held that the right to vote may not be voided on the basis of whether one is a property owner or a parent. *Gordon v. Lance* upheld a *supermajoritarian* vote requirement at all levels of government, with respect to a particular issue (bonded indebtedness), because no "independently identifiable group," much less a discrete and insular minority, was adversely affected. 403 U.S. at 5.

At root, these cases hold that each person's vote must be exercised with equal weight and freedom. These cases do not concern the *range of issues* that all voters may or may not vote upon. They certainly do not implicate a restructuring of the overall political process. Amendment 2 does not, after all, present a case where homosexuals and bisexuals have been denied the right to vote in upcoming general elections,[8] or where reapportionment or other state

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("*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"). *See also* Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 Vand. L. Rev. 397, 421-26 (1985) (hereafter, "*Hunter Doctrine*") (*Hunter* doctrine limited to state action embodying a racial classification).

[8]"By definition, however, a referendum, affords all similarly situated people an equal opportunity to vote. The referendum requirements in *Hunter* and *Seattle School Dist.* did not threaten to disenfranchise certain voters by placing special procedural burdens on their right to vote." *Hunter Doctrine*, 30 Vand. L. Rev. at 429. *Compare Hill v. Stone*, 421 U.S. 289 (1975) (invalidating provision limiting voters in city bond elections to persons who

action has diluted the value of their individual votes;[9] likewise, no supermajoritarian requirement has been imposed upon homosexuals and bisexuals.

The court below further attempted to justify its ruling on the basis of this Court's decisions in *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). However, these cases are wholly inapposite. In *Williams*, this Court held that a complex state statutory structure violated the rights to vote and to associate, because it had the effect of excluding from the ballot all but the candidates of the two major political parties. In *Illinois State Bd. of Elections*, this Court reviewed a scheme which placed higher burdens on new or third-party candidates for local offices than for statewide offices. As in *Williams*, this Court struck down the scheme because it placed an unacceptable burden upon the rights to vote and to associate, both of which are recognized fundamental rights. Neither case stands for anything more than that the Constitution will not permit burdens on access to the ballot which are designed to protect the established parties.

Amendment 2, of course, presents no obstacles whatsoever to particular candidates or political parties. Indeed, homosexuals and bisexuals have the same access to the ballot, including the initiative process through which Amendment 2 was adopted, as all other Colorado citizens have. Rather than burdening any person's rights to

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have listed property for taxation); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (invalidating provision limiting voters in school district elections to persons owning or leasing taxable real property, or parents or custodians of children enrolled in schools).

[9]*See Reynolds v. Sims*, 377 U.S. 533 (1964). *See also Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 898 (2d Cir. 1980) ("The one-person, one-vote doctrine requires no more, and does not create rights and privileges beyond the warranty of mathematical equivalency of votes").

vote or associate, all Amendment 2 does is raise a certain issue to a constitutional level. Neither the fundamental right to vote, nor that to petition government, encompasses a right to require the state legislature or a local government to entertain matters that are beyond its authority to address. *See Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-65 (1979).

Moreover, even if the right to vote cases could be said to support respondents' position, that would merely reinforce the need to resolve precisely how *Hunter* should be interpreted. However, in light of *Valtierra* and *Seattle School Dist.*, it is manifest that the Colorado Supreme Court's extension of *Hunter* is foreclosed by the decisions of this Court, and also conflicts with decisions of other courts. Accordingly, review by this Court of the issue presented is clearly warranted.

II. THE COLORADO SUPREME COURT'S DETERMINATION THAT SEXUAL ORIENTATION TRIGGERS HEIGHTENED PROTECTION UNDER THE EQUAL PROTECTION CLAUSE CONFLICTS WITH THE DECISIONS OF SEVERAL COURTS OF APPEALS

Under the Colorado Supreme Court's decision, sexual orientation defines an "identifiable group" that warrants special constitutional protection under the Fourteenth Amendment. The Colorado Supreme Court acknowledged that other courts have held that sexual orientation does not define a "suspect class" or "quasi-suspect class" for purposes of the Equal Protection Clause, and the court below was not asked to, and did not rely upon that analysis. Pet. App. B-6 n.3, D-7-8. Nonetheless, without using the term "suspect class or quasi-suspect class," the court below created equivalent protection and achieved the same result. It is the legal analysis used to achieve that result that is presented for review.

The court below held that Amendment 2 triggered strict scrutiny under the Equal Protection Clause "because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." Pet. App. at D-25. State legislation routinely makes distinctions between, and imposes burdens on, "identifiable groups" defined by characteristics such as income, occupation, property ownership, residence, or receipt of services, but the opinion does not hint whether statewide regulation on those bases would be subjected to anything but rationality review.

In contrast to the Colorado Supreme Court's determination, every federal court of appeals that has considered the issue has concluded that some form of rational relationship review applies to governmental measures that draw distinctions based upon sexual orientation. *See, e.g., Steffan v. Perry*, No. 91-5409 (D.C. Cir. Nov. 22, 1994); *High Tech Gays v. Defense Investigations Security Clearance Office*, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (9th Cir. 1990) (rejecting strict scrutiny); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1988), *aff'd*, 470 U.S. 903 (1985). There is, however, continuing dispute within the Circuits regarding the proper standard of review under that general rubric. *Compare Steffan v. Perry* (subjecting government classification based upon sexual orientation to traditional, deferential rational basis review) *with Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992) (subjecting government classification based upon sexual orientation to "'active' rational basis review" that requires scrutiny of record support for challenged classification).

In addition, the Colorado Supreme Court's extension of heightened protection based upon sexual orientation conflicts with this

Court's ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986). There, this Court upheld, on a showing of only a rational basis, a statute criminalizing homosexual activity. If homosexual activity may be criminalized outright, it is assuredly nonsensical to say that restricting special legal protections to those professing a desire to engage in such activity requires a compelling interest. The court's decision leads to the absurd result that the only way the people of Colorado can obviate special protections for homosexuals is to criminalize homosexuality. *Cf. Richardson v. Ramirez*, 418 U.S. 24 (1974) (criminals can be denied right to vote, even after they have completed their sentences); *Woodward v. United States*, 871 F.2d at 1076 ("After *Hardwick*, it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm"). *See also Steffan v. Perry*, slip op. at 18 (characterizing dissenting opinion's disapproval of the military's ban on homosexuals as "an undisciplined rebellion against the governing constitutional doctrine.")

Further review is, therefore, warranted to resolve these conflicts regarding the appropriate standard of review to be applied to governmental classifications predicated upon sexual orientation.

III. THE DECISION BELOW PRESENTS AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE TO THE RIGHT OF SELF-GOVERNMENT

By finding an equal protection right of any "independently identifiable group" to pursue beneficial legislation at the local level, the Colorado Supreme Court has created widespread uncertainty and has potentially injected the judiciary into a broad range of issues heretofore reserved to state legislatures or to Congress.

Because the right identified by the Colorado Supreme Court is essentially unqualified, it will provide the basis to attack a wide range of routine federal and state legislation. For example, a vast array of federal tax, regulatory, and social legislation affects groups

that are "independently identifiable" based upon citizens' income, occupation, residence, health, age, or any number of other factors.[10] State regulation that might provide greater benefits or protections to any of these groups is preempted if in direct conflict with such federal legislation or if state law interferes with the goals and operation of federal law. U.S. Const. art. VI. Under the Colorado Supreme Court's reasoning, however, every such assertion of pre-emption may be challenged by a contrary constitutional claim that the Equal Protection Clause guarantees the right of the affected group to seek additional benefits at the state or local level.

Similarly, every state measure, including those contained in state constitutions, which are designed to achieve uniformity or to allocate benefits and burdens, may now be challenged on federal constitutional grounds as interfering with an identifiable group's ability to secure benefits from local governments. Colorado, like other States, has, through legislation, imposed tax, safety, environmental, and other requirements upon "independently identifiable" groups. The Colorado Constitution, likewise, burdens identifiable groups that desire public abortion funding,[11] the re-

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[10]Several members of this Court have indicated that the term, "independently identifiable group" can have an extremely expansive meaning. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) ("members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests," including those with "competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups"); *Karcher v. Daggett*, 462 U.S. 725, 754 n.12 (1983) (Stevens, J., concurring) ("Identifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context.").

[11]By virtue of Colo. Const. art. V, § 50, the State is prohibited from spending public funds to assist, financially or otherwise, in the inducement of abortion, except in very narrow circumstances. Abortion advocates must seek a constitutional amendment to fund this particular medical procedure; advocates for any other medical procedure need only seek a statute. These

election of incumbent officials,[12] reorganization of certain school districts,[13] certain municipal annexations,[14] and limited gaming.[15] These measures, as well as the allocation of power to make these determinations, are "intimately related to the process of democratic self-government" committed to the States. *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991); *see also* U.S. Const. amend. X.[16] Colorado, like other States,

> permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Anytime a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.

Seattle School Dist. 458 U.S. at 496 (Powell, J., dissenting).[17] The Colorado Supreme Court's decision bars efforts to determine these matters at the state level and resurrects the "vested constitutional right to local decision-making" specifically rejected in *Seattle School Dist.*, 458 U.S. at 480 n.23.

Already, the federal district court in Cincinnati, Ohio has seized upon the Colorado Supreme Court's rationale to invalidate a voter-enacted anti-special rights amendment to the municipal charter based upon what it termed the "thorough analysis of the Colorado Supreme Court in *Evans v. Romer*." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235, 1238 (S.D. Ohio 1993), *injunction made permanent*, 860 F. Supp. 417 (S.D. Ohio 1994), *appeal filed*, Nos. 94-3855 and 94-3973 (6th Cir. 1994) (decision based upon both "identifiable group" and "suspect class" grounds). Like the Colorado Supreme Court, the federal district court in Ohio concluded that this Court's rulings "stand for the broader proposition that States may not disadvantage *any* identifiable

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types of provisions are patently constitutional. *See Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Harris v. McCrae*, 448 U.S. 297 (1980).

[12]Colo. Const. art. XVIII, § 9a limits the terms of state elected officials, thereby preventing the identifiable group of supporters of particular incumbents from voting for the candidate of their choice. *See also* Colo. Const. art. IV, § 1; *id.* art. V, § 3.

[13]Colo. Const. art. XX, § 7 establishes a single school district for the City and County of Denver. Although the residents of any other school district may divide or reorganize their district simply by obtaining a statute to that effect, residents of Denver must obtain a constitutional amendment.

[14]Colo. Const. art. XX, § 1 and art. XIV, § 3, prevent the City and County of Denver from annexing land in any manner other than as a county. The citizens of Denver bear a greater burden than citizens of other Colorado cities, but this presents no cognizable constitutional question. *Cf. City of Glendale v. Buchanan*, 195 Colo. 267, 578 P.2d 221 (1978); *Board of County Comm'rs v. City & County of Denver*, 150 Colo. 198, 372 P.2d 152 (1962), *appeal dismissed*, 372 U.S. 679 (1963).

[15]Colo. Const. art. XVIII, § 9 allows limited gaming only in Central City, Black Hawk, and Cripple Creek. All other Colorado communities must obtain a constitutional amendment.

[16]Indeed, in every State in the country, the people themselves retain the power to approve or disapprove amendments to their respective constitutions. Council of State Governments, *The Book of the States* at 42-43 (1990).

[17]It is important to note that Justice Powell was joined by three other Justices in dissenting from the majority's invalidation of a statewide referendum found to "impose substantial and unique burdens on racial minorities . . .." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 470 (1982). In the absence of any such burden, the people of a State are free to amend their constitution through democratic processes.

group, whether a suspect category or not, by making it more difficult to enact legislation on its behalf." 838 F. Supp. at 1241 (emphasis in original).

Even if the Colorado Supreme Court's decision were or could be limited to determinations regarding rights based upon sexual orientation, it represents a dramatic and unwarranted interference in the political process that necessitates this Court's review. The political battle surrounds competing claims of rights. On one side, there are those who support measures such as Amendment 2 as a means of protecting their right to be free from intrusive special protection laws.[18] Eighteen months ago, citizens' groups in at least fourteen other States were considering sponsoring measures similar to Amendment 2;[19] now, however, the doctrine applied below is being used not only to discourage popular support for these measures, but to legally block them from the ballot.[20]

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[18]R. Duncan and G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?* 9 Notre Dame J. of Law, Ethics & Pub. Pol'y ___, ___ (1994) ("the plaintiffs in *Evans* seek not the vote, but the right to regulate the lives and property of others free of constitutional limitations designed to protect the liberties of those whom they seek to regulate.") (Article is to be published shortly and will be lodged with the Court upon publication).

[19]Those States are Arizona, California, Florida, Georgia, Idaho, Iowa, Maine, Michigan, Minnesota, Missouri, Montana, Ohio, Oregon, and Washington. *See Anti-Gay-Rights Drive Spreads*, Denver Post, Mar. 5, 1993, at 1.

[20]*See Amendment 2: Gay Rights Gain New Momentum*, Denver Post, Oct. 12, 1994, at 11A (*Evans* doctrine used to oppose ballot measures in Florida, Idaho, and Oregon).

On the other side of the debate, there are those who support special protections for homosexuals and bisexuals. Presumably, then, those statewide measures *extending* special protections to homosexuals and bisexuals[21] also infringe upon the "fundamental right" of identifiable groups, such as CFV, which oppose special protections. To rule otherwise would mean that only those favoring special protections could appeal to the state legislature or the people if they lost at the local level.[22] In truth, whichever side wins the public policy debate at the statewide level, the losers face a greater burden with respect to their right to participate at the local level. This is no violation of the Constitution; it is, rather, a basic fact of political life in this Nation since its inception.

Rather than permitting the range of issues associated with sexuality to be widely debated and determined through the political process at a variety of levels, the Colorado Supreme Court has determined that the federal Constitution dictates the terms of political debate, insulating that debate from the state legislature or even the people themselves. The decision below strikes at the heart of voter

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[21]Eight States have enacted special protections for homosexuals and bisexuals at a statewide level. *See* Cal. Civ. Code § 51.7 (West 1982); Cal. Labor Code § 1102.1 (West 1989); Conn. Gen. Stat. Ann. § 46a-81a to 46a-81r (West 1986); Haw. Rev. Stat. §§ 378-1, 378-3 (1992 Supp.); Mass. Gen. L. ch. 1518 §§ 3, 4 (1982); Act of Apr. 2, 1993, 1993 Minn. Sess. Law Serv. 81 (West) (amending Minn. Stat. 1992 § 363); N.J. Stat. Ann. §§ 10:5-5, 10:5-12 (West 1993); Vt. Stat. Ann. tit. 1, § 143 (1985), tit. 9, §§ 4503-4504 (1984), tit. 21, § 495 (1987); Wis. Stat. Ann. §§ 101.22, 111.32 (West 1988). *See also* D.C. Code Ann. §§ 1-2502, 1-2503 (1991).

[22]In Oregon, where a statewide anti-homosexual rights proposal was defeated in 1992, communities have attempted to enact local anti-homosexual rights measures. In marked contrast to the instant case, homosexual rights advocates are arguing there that new state legislation bars such measures, because "[t]he issue of discrimination based on sexual orientation is a statewide concern, and [opponents'] divide and conquer mentality will not be tolerated." *See Oregon Lawmakers Ban Local Votes on Gay Bias*, N.Y. Times, July 30, 1993, at A-10.

sovereignty, and of federalism itself, because any distinction made by government in the establishment of its political structure becomes vulnerable to constitutional attack.[23] Any individual voter whose cause is unsuccessful in a referendum would be entitled to overturn that referendum, simply because the majority imposed its will on a minority concern. If that were the law, major public policy issues could not be decisively settled through the political process; government would be obliged continually to reconsider every policy choice.

This issue in this case is neither isolated nor inconsequential; if unchecked, the doctrine adopted by the court below threatens completely to reshape our political processes, the highest expression of which is the power of the people to establish and amend their state constitutions as they deem appropriate. In setting aside Amendment 2, the Colorado Supreme Court nullified the will of the people of Colorado, solely because it believed the decisions of this Court compelled such a result. The uncertainty of the future of popular self-government not only in Colorado, but indeed every state and local government in the entire Nation, warrants the grant of certiorari.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted. Alternatively, the Court should reverse summarily on the basis of *James v. Valtierra*.

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[23] "The potential scope of the right recognized by the Colorado court in *Evans* is breathtaking. If the court means what it says, it has discovered a constitutional right of any 'independently identifiable class of persons' to have its political agenda insulated against the constitutional rights of others." R. Duncan and G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 Notre Dame J. of Law, Ethics & Pub. Pol'y at ___.

Respectfully submitted this 9th day of December, 1994.

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APPENDIX A

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SA48
Appeal from the District Court, City and County of Denver,
92CV7223

MANDATE

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNSEL OF ASPEN,

Plaintiff-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado and the STATE OF COLORADO,

Defendants-Appellants.

This cause having been brought to this court as an appeal from the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED and adjudged that the judgment of the District Court of the City and County of Denver shall be, and the same hereby is, AFFIRMED.

IT IS FURTHER ORDERED that the cost of $260.00 is awarded for the Plaintiffs-Appellees and against the Defendants-Appellants, pursuant to C.A.R. 39.

NOW THEREFORE, jurisdiction of this cause is returned to the District Court of the City and County of Denver.

WITNESS, the HONORABLE LUIS D. ROVIRA, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City and County of Denver, this 14th day of November, 1994.

MAC V. DANFORD
Clerk of the Supreme Court

_____
Deputy Clerk

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APPENDIX B

SUPREME COURT, STATE OF COLORADO
NOS. 94SA48 & 94SA128 October 11, 1994

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN, Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO, Defendants-Appellants.

Appeal from the District Court, City and County of Denver
Honorable H. Jeffrey Bayless, Judge

EN BANC JUDGMENT AFFIRMED

Defendants, Roy Romer, Governor of the State of Colorado, Gale A. Norton, Attorney General of the State of Colorado, and the State of Colorado (defendants) appeal the trial court's entry of a permanent injunction enjoining them from enforcing a voter-initiated amendment to the Colorado Constitution ("Amendment 2"). We affirm.

I

In May 1992, petitions which would amend the Colorado Constitution by adding a new section 30 to article II were filed with

the secretary of state. The proposed amendment was put to the voters as Amendment 2 on November 3, 1992, and passed by a vote of 813,966 to 710,151 (53.4% to 46.6%). The secretary of state certified the results on December 16, 1992, as required by article V, section 1, of the state constitution.

Amendment 2 provides:

> **No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.** Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On November 12, 1992, Richard G. Evans, along with eight other persons, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen (plaintiffs) filed suit in Denver District Court to enjoin the enforcement of Amendment 2 claiming that the amendment was unconstitutional.

The trial court conducted an evidentiary hearing to consider plaintiffs' motion for a preliminary injunction. Subsequently, the court granted the motion and prohibited the defendants from enforcing Amendment 2 pending the outcome of a trial on the merits.[1]

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[1]The trial court concluded that plaintiffs had met the threshold requirement of *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), by demonstrating that enjoining the enforcement of Amendment 2 was necessary to protect their right to equal protection of the laws under the United States Constitution. The trial court then determined that because Amendment 2 may burden a fundamental constitutional right, its constitutionality must be assessed by reference to the "strict scrutiny" standard of review. The court concluded that under this standard, plaintiffs had shown to a reasonable

The defendants appealed pursuant to C.A.R. 1(a)(3), and we granted review. *See Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*Evans I*). In *Evans I*, we first addressed the question of the legal standard to be applied in reviewing the trial court's entry of the preliminary injunction. Following the precedent of the United States Supreme Court, we held that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process," and "that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." *Id.* at 1282.

After recognizing that "[t]he immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation" and that the "'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures," we held:

> [T]he right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.

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probability that Amendment 2 would be demonstrated to be unconstitutional beyond a reasonable doubt at a trial on the merits.

Id. at 1285. We concluded that the trial court did not err in granting the preliminary injunction enjoining defendants from enforcing Amendment 2.

After our decision in *Evans I*, the case was remanded to the trial court to determine whether Amendment 2 was supported by a compelling state interest and narrowly tailored to serve that interest. *Id.* at 1286. At trial the defendants offered six "compelling" state interests: (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial, and religious privacy; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of Colorado children.[2]

The trial court concluded that the interest in deterring "factionalism" was in truth, nothing more than an attempt to impede the expression of "a difference of opinion on a controversial political question . . . ." It concluded that the first governmental interest was not a compelling state interest but rather, that "the *opposite* of defendants' claimed compelling interest is most probably compelling," i.e., encouraging the competition of ideas with uninhibited, robust, and wide-open political debate.

The trial court found that the interest of preserving the State's political functions, premised on the Tenth Amendment right of the states to amend state constitutions, was not a compelling interest since "[d]efendants' legal argument is not supported by federal or state case law, nor is it supported by the Colorado Constitution."

With respect to the interest in preserving the ability of the state to remedy discrimination against groups which have been held to be suspect classes, the trial court stated its doubt as to whether fiscal concerns of the state rise to the level of a compelling state interest. The court held that Amendment 2 could not be understood to further this interest because,

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[2]The state has not reasserted the sixth interest on appeal.

> [d]efendants' evidence was principally in the form of opinion and theory as to what *would* occur if a Denver type ordinance were adopted as a state statute. There is no such statute, nor is one proposed. Plaintiffs' evidence was based on what *has happened* over the course of eleven years in Wisconsin, and during the time in which the Denver ordinance has included a sexual orientation provision. Those actual experiences show that the presence of a sexual orientation provision has *not* increased costs or impaired the enforcement of other civil rights statutes or ordinances.

Thus, the trial court concluded that "defendants' offered evidence of lack of fiscal ability [is] unpersuasive in all respects."

The trial court held that preventing the government from interfering with personal, familial, and religious privacy was, in part, a compelling state interest. Although the court acknowledged promotion of family privacy is a compelling state interest, it held that defendants never established what they meant by the term "family." Moreover, defendants failed to "tie-in . . . the interest of protecting the family and denying gays and bisexuals the right to political participation . . . ."

The trial court also found that preserving religious liberty was a compelling state interest. However, it held that Amendment 2 was not narrowly tailored to serve this interest. "The narrowly focused way of addressing [antidiscrimination protections for gay men, lesbians, and bisexuals] is to add to it a religious exemption such as is found in the Denver and Aspen ordinances, not to deny gays and bisexuals their fundamental right of participation in the political process."

The trial court rejected the personal privacy component of the argument on the grounds that "[t]he general issue of whether personal privacy is a compelling state interest was not adequately established. The court can only speculate as to what defendants mean by personal privacy and how Amendment 2 protects such a right."

The interest in preventing government from subsidizing the political objectives of a special interest group was rejected on the grounds that "[t]his claimed compelling interest was not supported by

any credible evidence or any cogent argument, and the court concludes that it is not a compelling state interest."

Similarly, the trial court rejected the argument that the protection of children is a compelling state interest served by Amendment 2 because "[d]efendants have failed to present sufficient evidence to support this claimed compelling interest."

Accordingly, because the trial court concluded that Amendment 2 was not necessary to support any compelling state interest and narrowly tailored to meet that interest, it permanently enjoined the enforcement of Amendment 2.[3]

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[3]The court rejected plaintiffs' argument that gay men, lesbians, and bisexuals should be found to be either a "suspect class" or a "quasi-suspect class." The trial court rejected this argument because it concluded that "[h]omosexuals fail to meet the element of political powerlessness and therefore fail to meet the elements [necessary] to be found a suspect class." This ruling has not been appealed and thus, we do not address it.

The trial court also declined plaintiffs' request to analyze the constitutionality of Amendment 2 under the "rational basis test." In so doing, it stated:

> The Colorado Supreme Court has ruled that Amendment 2 invades a fundamental right of an identifiable group and that the test to be applied is the strict scrutiny test. The rational basis test is to be used when there is no fundamental right or suspect class involved. Therefore this court declines to apply a legally inappropriate test to this case.

Plaintiffs have again argued to this court that Amendment 2 does not pass constitutional muster under the less stringent rational basis test. They argue that each of the state's purported compelling interests are not rationally related to the enactment of Amendment 2. Because we decline to revisit our holding in *Evans I, see infra* Part II, and again conclude that Amendment 2 affects a fundamental right, its constitutionality must be analyzed under the strict scrutiny standard of review. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982) ("laws that impinge upon the exercise of a 'fundamental right' [require] the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest").

On appeal the defendants argue that: (1) the legal standard set forth by this Court in *Evans I* for assessing the constitutionality of Amendment 2 should be reconsidered; (2) Amendment 2 is supported by several compelling state interests and is narrowly tailored to meet those interests; (3) that the unconstitutional provisions of Amendment 2 are severable from the remainder; and (4) Amendment 2 is a valid exercise of state power under the Tenth Amendment to the United States Constitution.

II

Defendants first ask that we reconsider the constitutional principles articulated in *Evans I*, but they offer no arguments that were not then considered and rejected by this court. We see no reason to revisit that decision. We reaffirm our holding that the constitutionality of Amendment 2 must be determined with reference to the strict scrutiny standard of review.[4]

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[4]After this court decided *Evans I*, a Federal District Court enjoined the enforcement of a voter enacted amendment to the Cincinnati, Ohio city charter almost identical to Amendment 2, which prohibited the city from enacting any ordinance, regulation, rule or policy which entitled gay men, lesbian or bisexual individuals to minority or protected status. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993) (*Equality I*). The court found it highly likely that the right to participate equally in the political process is a fundamental right, protected by the Equal Protection Clause and requires strict judicial scrutiny on review. The court concluded relevant Supreme Court precedent supported the proposition that "[s]tates may not disadvantage *any* identifiable group, whether a suspect category or not, by making it more difficult to enact legislation on its behalf." *Id.* at 1241 (citing *Evans I*, 854 P.2d 1270, 1281, 1283 (Colo. 1993); *Gordon v. Lance*, 403 U.S. 1, 7 (1971); *Hunter v. Erickson*, 393 U.S. 385, 393 (1969)). After a trial on the merits, the court made the injunction permanent holding *inter alia* that the amendment violated the plaintiffs' fundamental right to equal access to the political process. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, Slip op. at 26, 1994 WL 442746 at *11 (S.D. Ohio 1994). The court explained "any legislation that disadvantages an independently identifiable group of people by making it more difficult for that group to enact legislation in its behalf, 'fences' that group out of the political process, and thereby violates

III

A legislative enactment which infringes on a fundamental right or which burdens a suspect class is constitutionally permissible only if it is "*necessary* to promote a *compelling* state interest," *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972), and does so in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217 (1982). The question of what constitutes a compelling state interest is one of law and thus, we review the trial court's ruling *de novo*. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 772 n.30 (5th Cir. 1993); *Scott v. Rosenberg*, 702 F.2d 1263, 1274 (9th Cir. 1983). Defendants argue that Amendment 2 is supported by a number of compelling state interests and is narrowly tailored to serve those interests.[5]

A

Defendants' first asserted governmental interest is in protecting the sanctity of religious, familial, and personal privacy. Freedom of religion is expressly guaranteed by both the First Amendment to the United States Constitution and article II, section 4 of the Colorado Constitution and stands at the core of our Nation's history and tradition. It is among the highest values of our society. *See Murdock v. Pennsylvania*, 319 U.S. 105, 115-17 (1943). There can be little doubt that ensuring religious freedom is a compelling governmental interest.

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their fundamental rights." *Id.* (citing *Equality I*, 838 F. Supp. at 1238-42; *Evans I*, 854 P.2d at 1282.).

[5]We note at the outset that defendants argue that all of the asserted compelling interests which support Amendment 2 are narrowly tailored on the grounds that "there is absolutely *no other way* that the people could further the common elements of the various compelling interests but through the enactment of Amendment 2." We do not specifically address this argument for two reasons. First, as will be made clear below, none of the interests identified by defendants are compelling. Second, defendants never articulate what the "common elements of the various compelling interests" are, and we are simply unable to ascertain any specific "common elements" which all of those interests share.

Defendants argue that Amendment 2 is necessary to serve this interest because "[u]nder the ordinances preempted by Amendment 2, individual landlords or employers who have deep-seated and profound religious objections to homosexuality would nonetheless be compelled to compromise those convictions, under threat of government sanctions." In support of this proposition, defendants rely on *Smith v. Commission of Fair Employment & Hous.*, 30 Cal. Rptr.2d 395 (Cal. App. 3 Dist. 1994), *pet. for reveiw granted and opinion superseded by Smith v. Fair Employment & Hous. Comm'n*, 33 Cal. Rptr.2d 567, 880 P.2d 111 (Cal. Sept. 8, 1994). (*See* Cal. Ct. Rules 976(d) opinion withdrawn from publication pending review).

In *Smith*, the plaintiff challenged the ruling of the California Commission of Fair Employment and Housing which found that she had impermissibly discriminated, based on their marital status, against a couple who sought to rent housing. The couple was unmarried and the plaintiff refused to rent to them on the grounds that doing so would violate her deeply-held religious beliefs. Plaintiff was ordered to cease and desist marital discrimination; post a notice announcing her violation of California law for ninety days; permanently post a notice to rental applicants of their rights and remedies under California antidiscrimination laws; and sign both notices and provide copies to each person who subsequently expressed an interest in renting her property. *Id.* at 397-98.

The California court of appeals concluded that the commission's order substantially burdened plaintiff's free exercise rights because she "cannot remain faithful to her religious convictions and beliefs and yet rent to unmarried couples." *Id.* at 399.[6]

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[6]Nevertheless, the court held, "it is clear that free exercise of religion as protected by the First Amendment is not actionably infringed by applying to plaintiff a facially neutral statute which merely proscribes marital status discrimination, notwithstanding plaintiff's religious scruples against renting to unmarried couples." *Id.* at 401. This conclusion was reached based on the fact that "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 400 (quoting *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. at 878 (1990)).

Assuming *arguendo* that ordinances such as that in effect in Boulder, which prohibit discrimination against gay men, lesbians, and bisexuals in housing and employment but which contain no exception for religiously-based objections, substantially burden the religious liberty of those who object to renting or employing gay men, lesbians, or bisexuals on religious grounds, the enactment of Amendment 2 clearly is not narrowly tailored to serve the interest of ensuring religious liberty. To the contrary, an equally effective, and substantially less onerous way of accomplishing that purpose simply would be to require that antidiscrimination laws which include provisions for sexual orientation also include exceptions for religiously-based objections. This is precisely what the Denver antidiscrimination laws provide. Denver, Colo., Rev. Mun. Code art. IV, §§ 28-92, 28-93, 28-95 to 28-97 (1992 Supp.). Similar exemptions for religious organizations are found in federal antidiscrimination statutes. *See, e.g.*, 42 U.S.C. § 2000e-1 (1994 Supp.) (exempting religious organizations from the prohibition against employment discrimination); 42 U.S.C. § 3607 (1994 Supp.) (exemption for religious organizations in housing and public accommodation).[7] Defendants do not, and we doubt that they could, argue that the Denver ordinance impairs religious freedom. Indeed, Joseph Broadus, who testified as an expert witness on behalf of the defendants, testified that imposing a religiously-based exemption on antidiscrimination laws intended to protect gay men, lesbians, and bisexuals would be less restrictive than Amendment 2 and would adequately address any concerns about religious liberty.

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[7]We do not rule today on the adequacy of any religious exemptions contained in existing antidiscrimination laws. The question whether antidiscrimination laws violate the free exercise clause of the First Amendment by prohibiting discrimination based on marital status has recently been addressed by two state supreme courts with mixed results. *See Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (Statutory mandate that landlords cannot discriminate against cohabitating unmarried couples substantially burdened landlords' sincerely held religious belief protected by the Massachusetts state constitution. Case remanded to decide whether a compelling governmental interest in eliminating such discrimination justified the infringement); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (enforcement of facially neutral fair housing laws did not violate a landlord's right to free exercise of religion under either the state or federal constitution).

It is clear that Amendment 2, which affects the fundamental right of gay men, lesbians, and bisexuals to participate equally in the political process, is not the least restrictive means of ensuring religious liberty, and is not narrowly tailored to serve the compelling governmental interest in ensuring the free exercise of religion.

Defendants also argue that Amendment 2 serves the compelling interest of preserving "familial privacy." Family privacy is characterized by defendants as the right "of some parents to teach traditional moral values" to their children. As support, defendants cite authority recognizing the sanctity of the family and the central role the family plays in society. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (parental role is "basic in the structure of our society").

Defendants contend that the "right of familial privacy" is "severely undermine[d]" by the enactment of antidiscrimination laws protecting gay men, lesbians, and bisexuals because "[i]f a child hears one thing from his parents and the exact opposite message from the government, parental authority will inevitably be undermined." This argument fails because it rests on the assumption that the right of familial privacy engenders an interest in having government *endorse* certain values as moral or immoral. While it is true that parents have a constitutionally protected interest in inculcating their children with their own values, *see Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), defendants point to no authority, and we are aware of none, holding that parents have the corresponding right of insuring that government endorse those values.

The United States Supreme Court has repeatedly held that the individual's right to profess or practice certain moral or religious beliefs does not entail a right to have government itself reinforce or follow those beliefs or practices. *See, e.g., Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("Never to our knowledge has the Court . . . require[d] the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."). Furthermore, it is clear that the government does not burden an individual's constitutional rights merely because it endorses views with which that individual may disagree. *See Block v. Meese*,

793 F.2d 1303, 1312-14 (D.C. Cir. 1986) (then Judge Scalia concluding that "[a] rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family . . . ."). *Id.* at 1313.

Consequently, fully recognizing that parents have a "privacy" right to instruct their children that homosexuality is immoral, we find that nothing in the laws or policies which Amendment 2 is intended to prohibit interferes with that right. With or without Amendment 2, parents retain full authority to express their views about homosexuality to their children. We believe that Amendment 2 is neither necessary nor narrowly tailored to preserve familial privacy because that right is not implicated by the laws and policies which Amendment 2 proscribes.

Defendants also argue that Amendment 2 serves the compelling state interest in preserving "personal privacy." While it is not entirely clear what is meant by the phrase, it appears that the defendants are referring to the right of "associational privacy" which will be impaired in the absence of Amendment 2 because individuals may be forced to associate with gay men, lesbians, and bisexuals in the rental of housing.[8]

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[8]The defendants' entire argument addressing the issue of personal privacy constitutes a single paragraph. It reads:

> The court below found that both religious liberty and familial privacy are indeed compelling interests. However, the court rejected the notion that personal privacy could be a compelling interest, finding that the Defendants had addressed it only "tangentially." This finding ignores testimony such as that offered by Ann Ready of Madison, Wisconsin, who shared a house with four other women, but refused to share it with a lesbian. She stated that she "had rejected several heterosexual males for the same reason, namely the potential for [unwanted] physical, sexual attraction." Ms. Ready was subsequently found to have violated both municipal and state sexual orientation laws. That preventing this sort of intrusion into personal matters of the utmost privacy is a compelling interest,

As the Supreme Court has explained, the right of associational privacy protects associations involving,

> deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. . . . [T]hey are distinguished by such attributes as relative smallness, a high degree of selectivity in the decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

While preserving associational privacy may rise to the level of a compelling state interest, Amendment 2 is not narrowly tailored to serve that interest. Amendment 2 would forbid governmental entities from prohibiting discrimination against gay men, lesbians, and bisexuals (because they are gay, lesbian, or bisexual) in *all* aspects of commercial and public life, no matter how impersonal. Amendment 2 affects a vast array of affiliations which in no way implicate associational privacy. None of the criteria needed to precipitate associational privacy rights exists: there is no "special community" distinguished by "selectivity," "relative smallness," or any concern with "distinctively personal aspects of one's life." *Id.*

> [A]n association lacking these qualities--such as a large business enterprise--seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.

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should be obvious.

(citations to the record omitted).

Id. (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) and *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945)).

To the extent that antidiscrimination laws protecting gay men, lesbians, and bisexuals have the potential to implicate associational privacy rights, a narrower way of avoiding this conflict would be to exempt the sort of intimate associations identified in *Roberts* from the scope of such laws. For instance, landlords could be allowed to discriminate against homosexuals in the rental of owner-occupied housing -- the so-called "Mrs. Murphy's Boarding House" exception. *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3603(b) (1988 & 1994 Supp.) (exempting certain owner-occupied housing from the Fair Housing Act); *Statutory History of the United States: Civil Rights, Part II* 1741-52, 1805-06 (B. Schwartz ed. 1970) (detailing legislative history and policies underlying "Mrs. Murphy's Boarding House" exemption in Fair Housing Act). Similar exemptions already exist under Colorado law. For instance, Denver's antidiscrimination ordinance exempts from its housing and public accommodation provisions multiple unit dwellings of not more than two units where one of the units is owner occupied. Denver, Colo., Rev. Mun. Code art. IV, §§ 28-95(b)(2) & 28-96(b)(2) (1991). Similarly, the Colorado Civil Rights statute exempts from the definition of "housing" any room offered for rent or lease in a single-family dwelling occupied in part by the owner. § 24-34-501(2), 10A C.R.S. (1988).

Amendment 2, however, does no such thing. Rather, it prohibits governmental entities from enacting laws barring discrimination against gay men, lesbians, and bisexuals in all contexts, regardless of the nature of the relationship involved and the extent of intimacy inherent in those relationships. Amendment 2 sweeps more broadly than necessary and is not narrowly tailored to serve the governmental interest in preserving associational privacy.

B

Defendants next assert that because "laws and policies designed to benefit homosexuals and bisexuals have an adverse effect on the ability of state and local governments to combat discrimination against suspect classes. . . . Amendment 2 is an appropriate means whereby the people sought to focus government's limited resources upon those

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officer for Denver's antidiscrimination ordinance testified that Denver's protection of gay men, lesbians, and bisexuals has not prevented Denver from protecting other groups or had any significant fiscal impact on Denver. The chief of Wisconsin's Civil Rights Bureau testified, based on twelve years experience with Wisconsin's enforcement of its antidiscrimination laws, that protection of gay, lesbian, and bisexual persons has not limited enforcement of other parts of the Wisconsin statutes. The trial court found that protecting gay men, lesbians, and bisexuals from discrimination "has *not* increased costs or impaired the enforcement of other civil rights statutes or ordinances."[10] This finding is supported by the record and substantiates the conclusion that Amendment 2 is not necessary to serve the governmental interest asserted.

Even if protecting gay men, lesbians, and bisexuals from discrimination has some fiscal impact on the state, Amendment 2 is not narrowly tailored to serve that interest. Ensuring that certain racial, gender, or ethnic groups receive undiminished funds for civil rights enforcement could easily be accomplished by ear-marking funds to cover the costs of such enforcement. Under such an arrangement, any protection for gay men, lesbians, and bisexuals would have to be funded from sources other than funds reserved for the protection of the specified suspect classes. The governmental interest in insuring adequate resources for the enforcement of civil rights laws designed to protect suspect classes from discrimination need not be accomplished by denying the right of gay men, lesbians, and bisexuals from participating equally in the political process. Rather, this interest can be served in such way that no persons' fundamental rights need be denied.

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legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals.

[10]The trial court rejected the testimony of the defendants' witnesses who, while having no experience in the enforcement of civil rights laws intended to protect gays, lesbians, and bisexuals, speculated that doing so would create increased costs and limit the ability to enforce laws intended to protect suspect classes.

The defendants' second asserted governmental interest in support of Amendment 2 is neither necessary nor narrowly tailored to serve that interest.

C

Defendants next argue that Amendment 2 "promotes the compelling governmental interest of allowing the people themselves to establish public social and moral norms."[11] In support of this proposition, defendants define two related norms which are promoted by Amendment 2: Amendment 2 preserves heterosexual families and heterosexual marriage and, more generally, it sends the societal message condemning gay men, lesbians, and bisexuals as immoral.

The only authority relied on to support the view that the protection of morality constitutes a compelling governmental interest is *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991). Defendants cite the plurality opinion in *Barnes* for the proposition that "the State's interest in protecting order and morality is compelling; substantial; subordinating; paramount; cogent; strong." *Barnes* does not support defendants' contention that protecting public morality constitutes a compelling governmental interest.

In *Barnes*, four Justices held that "the public indecency statute . . . furthers a *substantial* government interest in protecting

[11]There is some dispute as to whether consideration of this asserted interest is properly before this court. Plaintiffs point out that in contrast to the six governmental interests addressed by the trial court, morality was not listed in the state's disclosure certificate or the state's opening statement at trial as a separate interest supporting Amendment 2.

Defendants argue that it presented the interest in public morality to the district court and as support, cites an introductory paragraph contained in its brief to that court which stated that "the issue of public morality . . . permeates the discussion of compelling interests and indeed, can be regarded as a compelling interest in its own right." In our judgment, this is sufficient to conclude that the interest of public morality was presented to the trial court as a rationale for Amendment 2 and thus, this asserted interest is properly before this court.

order and morality." *Barnes*, 501 U.S. at 567 (emphasis added). Justice Souter provided the fifth vote in *Barnes*, however he did not rely "on the possible sufficiency of society's moral views to justify the limitations at issue." *Id.* at 582 (Souter, J., concurring). Rather, he was of the opinion that the Indiana law at issue (which prohibited completely nude dancing) was permissible due to the "State's substantial interest in combating the secondary effects of adult entertainment establishments . . . ." *Id.* None of the justices in *Barnes* concluded that furthering public morality constitutes a compelling state interest.

Consequently, defendants have cited no authority to support the proposition that the promotion of public morality constitutes a compelling governmental interest, and we are aware of none. At the most, this interest is substantial. However, a substantial governmental interest is not sufficient to render constitutional a law which infringes on a fundamental right – the interest must be compelling. *See Plyler v. Doe*, 457 U.S 202, 217 (1982).

Furthermore, even recognizing the legitimacy of promoting public morals as a governmental interest, it is clear to us that Amendment 2 is not necessary to preserve heterosexual families, marriage, or to express disapproval of gay men, lesbians, and bisexuals. First, we reject defendants' suggestion that laws prohibiting discrimination against gay men, lesbians, and bisexuals will undermine marriages and heterosexual families because married heterosexuals will "choose" to "become homosexual" if discrimination against homosexuals is prohibited. This assertion flies in the face of the empirical evidence presented at trial on marriage and divorce rates. For example, Wisconsin, the state with the oldest "gay rights" law in the nation, enacted in 1982, reports that the divorce rate in Wisconsin declined after the enactment of its antidiscrimination statute. *See* Center for Health Statistics, Division of Health, Wisconsin Dep't of Health & Social Services, *1990 Wisconsin Vital Statistics Report*, at p. 93, Figure 13 (divorce rates in Wisconsin peak at 3.9 divorces per 1,000 population in 1981 and decline thereafter to 3.6 divorces per 1,000 population in 1990).

Defendants also argue that the "endorsement" of homosexuality undermines marriage and heterosexual families because antidiscrimination laws implicitly endorse that conduct which is deemed an improper basis for discrimination. We are of the opinion,

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above, however, we do not believe that antidiscrimination laws constitute an endorsement of the characteristics that are deemed an unlawful basis upon which to discriminate against individuals. *See infra* pp. 25-26.

More significantly, defendants offer no authority to support the rather remarkable proposition that the government has a compelling interest in seeing that the state does not support the political objectives of a "special interest group." The state exists for the very purpose of implementing the political objectives of the governed so long as that can be done consistently with the constitution. The fact that some political objectives are promoted by "special interest groups" is utterly inconsequential. Indeed, virtually any law could be regarded as a benefit to a "special interest group." If defendants' argument had any merit at all, the compelling state interest defined would justify striking down almost any legislative enactment imaginable. This is clearly not the law. No citation of authority is needed to make the point.

We reject defendants' assertion that Amendment 2 is justified by the compelling governmental interest in not having the state endorse the political objectives of a special interest group.

E

Defendants claim that Amendment 2 "serves to deter factionalism through ensuring that decisions regarding special protections for homosexuals and bisexuals are made at the highest level of government." More specifically, they argue that "Amendment 2 is intended, not to restrain the competition of ideas," but "seeks to ensure that the deeply divisive issue of homosexuality's place in our society does not serve to fragment Colorado's body politic." Amendment 2 accomplishes this end by eliminating "city-by-city and county-by-county battles over this issue."

We reject the argument that the interest in deterring factionalism, as defined by defendants, is compelling. Political debate, even if characterized as "factionalism," is not an evil which the state has a legitimate interest in deterring but rather, constitutes the foundation of democracy. "[T]here is no significant state or public interest in curtailing debate or discussion of a ballot measure." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981). *See also*

Williams v. Rhodes, 393 U.S. 23, 32 (1968). We fail to see how the state, which is charged with serving the will of the people, can have any legitimate interest in preventing one side of a controversial debate from pressing its case before governmental bodies simply because it would prefer to avoid political controversy or "factionalism." *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views").

In support of the asserted compelling interest in deterring factionalism, defendants rely on *Storer v. Brown*, 415 U.S. 724 (1974). *Storer* involved a state requirement that proponents of *any* viewpoint resign from political parties and not run in those parties' primaries if the proponents intend to run as independent candidates. The purpose of this neutral election procedure was to insure that independent candidates were more than merely sore losers who, having lost one primary, ran as "independents" to satisfy "short-range political goals, pique, or personal quarrel." *Id.* at 735.

Neither *Storer*, nor any other case we are aware of supports the proposition that there is a compelling governmental interest in preventing divisive issues from being debated at all levels of government by prohibiting one side of the debate from seeking desirable legislation in those fora. We conclude that the interest in deterring "factionalism" is not a compelling state interest.

F

Defendants argue that each of the governmental interests, while individually adequate to validate Amendment 2, "are especially so when considered in the aggregate." None of the interests identified by the state is a necessary, compelling governmental interest which Amendment 2 is narrowly tailored to advance. Lumping them together as one grandiose (and rather ill-defined) interest makes them no more necessary, compelling, or narrowly tailored. In this context, the whole *is* equal, and is as equally deficient as the sum of its parts.

IV

Defendants next argue that the provisions of Amendment 2 are severable and that only those provisions pertaining to "sexual orientation" should be stricken as unconstitutional: "Plaintiffs have only challenged . . . the question of sexual *orientation.* They have not claimed or made any suggestion that Amendment 2's restrictions concerning homosexual or bisexual *conduct, practices,* and *relationships* are in any way constitutionally suspect."

In so arguing, defendants not only mischaracterize plaintiffs' position, but fundamentally misconstrue the intent of Amendment 2. In *Evans I,* we held that Amendment 2 had been shown to a reasonable probability to be unconstitutional on the grounds that it affected "the fundamental right to participate equally in the political process . . . . by 'fencing out' an independently identifiable class of persons . . . ." *Id.* at 1282. The constitutional infirmity of Amendment 2 recognized in *Evans I* was not limited to sexual orientation as opposed to restrictions concerning homosexual or bisexual conduct, practices, and relationships. To the contrary, it was based on the fact that Amendment 2 sought to deny an independently identifiable group's right to participate equally in the political process.

"Whether unconstitutional provisions are excised from an otherwise sound law depends on two factors: (1) the autonomy of the portions remaining after the defective provisions have been deleted and (2) the intent of the enacting legislative body." *Robertson v. City and County of Denver,* 874 P.2d 325, 335 (Colo. 1994) (quoting *City of Lakewood v. Colfax Unlimited Ass'n, Inc.,* 634 P.2d 52, 70 (Colo. 1981)).

We hold that the portions of Amendment 2 that would remain if only the provision concerning sexual orientation were stricken are not autonomous and thus, not severable. In addition to denying the right of equal participation in the political process to a group based on sexual orientation, Amendment 2 also is intended to deny that same right to persons based on "homosexual, lesbian or bisexual . . . conduct, practices or relationships . . . ."

Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices, and relationships. Each characteristic provides a potentially different way

of identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons.

The fact that there is no constitutionally recognized right to engage in homosexual sodomy, *see Bowers v. Hardwick,* 478 U.S. 186 (1986), is irrelevant. Amendment 2 by no stretch of the imagination seeks to criminalize homosexual sodomy. While it is true that such a law could be passed and found constitutional under the United States' constitution, it does not follow from that fact that denying the right of an identifiable group (who may or may not engage in homosexual sodomy) to participate equally in the political process is also constitutionally permissible. The government's ability to criminalize certain conduct does not justify a corresponding abatement of an independent fundamental right.

V

Last, defendants argue that even if Amendment 2 is in conflict with the Fourteenth Amendment to the United States Constitution, it is nevertheless a constitutionally valid exercise of the people's reserved powers under the Tenth Amendment.[12] In short, the argument is that the power to amend the state constitution is reserved to Colorado's voters under the Tenth Amendment, and even if the voters amend the state constitution in such a way as to violate the federal constitution, such an amendment is *per se* valid.

In support of this argument, defendants rely on *Gregory v. Ashcroft,* 501 U.S. 452 (1991). In *Gregory,* the Supreme Court held that the Age Discrimination in Employment Act does not apply to state court judges. In reaching this conclusion, the Court noted that decisions concerning the necessary qualification of state court judges "is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government and the character of those who exercise government authority, a state defines itself as a

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[12]The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

sovereign." *Id.* at 460. The court concluded that "Congressional interference with *this* decision of the people of Missouri, *defining their constitutional officers,* would upset the usual constitutional balance of federal and state powers." *Id.* (emphasis added).

Gregory applies only to cases involving federal interference with the qualification of constitutional officers. *See, e.g., Equal Employment Opportunity Comm'n v. Massachusetts,* 987 F.2d 64, 68-69 (1st Cir. 1993) (*Gregory* applies only when federal law interferes with state's definition of policy-making officials' qualifications); *Tranello v. Frey,* 962 F.2d 244, 249 (2d Cir. 1992) (same); *May v. Arkansas Forestry Comm'n,* 993 F.2d 632, 635-36 (8th Cir. 1993) (same); *Associated Builders & Contractors v. Perry,* 817 F. Supp. 49, 53 n.3 (E.D. Mich. 1992) (same).

States have no compelling interest in amending their constitution in ways that violate fundamental federal rights. *Reitman v. Mulkey,* 387 U.S. 369 (1967) (no reserved power to make right to discriminate a part of the state's basic charter); *Lucas v. Colorado Gen. Assembly,* 377 U.S. 713, 736-37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.").

We reject defendants' argument that Amendment 2 is a constitutionally valid exercise of state power under the Tenth Amendment.

VI

The state has failed to establish that Amendment 2 is necessary to serve any compelling governmental interest in a narrowly tailored way. Amendment 2 is not severable and not a valid exercise of state power under the Tenth Amendment. Accordingly, we affirm the trial court's entry of a permanent injunction barring its enforcement.

JUSTICE SCOTT concurs.
JUSTICE ERICKSON dissents.

Evans v. Romer, Nos. 94SA48 and 94SA128
JUSTICE SCOTT concurring:

I agree with the majority and join in its opinion and judgment. Amendment 2 is unconstitutional because it offends the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. I write separately, nevertheless, to suggest that Amendment 2 impermissibly burdens the right "peaceably to assemble and petition the government for redress of grievances," a right guaranteed to *every* citizen. Hence, the district court's permanent injunction should be upheld under the Privileges or Immunities Clause of the Fourteenth Amendment.

I

Citizenship, not the good graces of the electorate, is the currency of our republican form of government. Over 130 years ago, this nation was engaged in a great Civil War which tested our constitutional form of government as has no other time in our history. That great battle, joined to address issues of slavery and race, actually resolved much more. History teaches us that, in fact, our nation addressed a question of paramount importance: whether any state may, by legislative enactment or popular referendum, deny or refute the Union of the several states and render asunder the bonds of our constitutional form of government. Although answered at Appomatox, today we are called upon to answer, if not resolve, that question once more.

The federal Constitution, as submitted to the various states, created certain rights which the states cannot diminish. By joining the Union, Colorado "cannot be viewed as a single, unconnected, sovereign power, on [which] . . . no other restrictions are imposed than may be found in its own Constitution." *Fletcher v. Peck,* 10 U.S. (6 Cranch) 85, 135 (1810). Writing for the court in *Fletcher,* Chief Justice Marshall opined that each state "is a part of a large empire, . . . is a member of the American Union; and that Union has a constitution, the supremacy of which all acknowledge, and which imposes limits to . . . the several states, which none claim a right to pass." Id. Thus, within the limits of state sovreignty, most important questions are decided by the electorate. However, those matters in

which the result intrudes upon a protected liberty or fundamental right cannot be determined in the voting booth.

The framers originally recognized this potential for harm and understood that not every issue can be resolved by the vote of a majority. In The Federalist Papers, James Madison identified the covenant of "a well constructed Union" as its promise to protect and preserve inviolate certain rights of all citizens. The Federalist No. 10, at 42 (J. Madison) (Wills 1982). Madison noted that under other forms of government, "measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority." *Id.* at 43. Madison further stated:

> The interest of the man must be connected with the constitutional rights of the place . . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to controul itself.
>
> . . . .
>
> It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.

Id., No. 51, at 262 & 264. Appropriately, Madison suggested, the "cure" rests in a republican form of government -- a Union in which there is a "tendency to break and control the violence of faction." *Id.*, No. 10 at 42. The obligation to "guard one part of the society against the injustice of the other part" exists whether the oppressive act is the result of referendum or other state action. Hence, every individual is promised full citizenship under a written Constitution which, as Justice Harlan opined, "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559 (1895) (Harlan, J., dissenting).

Judge Robert Bork, addressing the same covenant, wrote of what he referred to as the "Madisonian dilemma," stating:

> The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty. To place that power in one or the other would risk either tyranny by the majority or tyranny by the minority.

Robert H. Bork, The Tempting of America: The Political Seduction of the Law 139 (1990) (hereinafter "Bork"). Such a dilemma can only be resolved by resort to a neutral written principal, the Constitution. We should look first to the text and to the understanding manifested in the words used by the framers. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819) (let the end be "within the scope of the constitution, and all means which are appropriate . . . which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional"); *Colorado Ass'n of Public Employees v. Lamm,* 677 P.2d 1350, 1353 (Colo. 1984) ("Where the language of the constitution is plain and its meaning clear, that language must be declared and enforced as written."); *see also* Bork at 145 ("If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives."). Where the words of the Constitution are unambiguous, we need not look further.

II

A

Section 1 of the Fourteenth Amendment of the United States Constitution declares: "All persons born or naturalized in the United

States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. Const. amend XIV, section 1.[1] The Fourteenth Amendment, in section 1, made state citizenship derivative of national citizenship and transferred to the federal government a portion of each state's control over civil and political rights.[2]

By the force of an unfortunate history and a refusal to rely upon the plain text of the constitution, our Fourteenth Amendment jurisprudence has resulted in a Privileges or Immunities Clause that has been eclipsed by the Equal Protection and Due Process Clauses. As a consequence, no important line of decision rests solely on the Privileges or Immunities Clause. Early on, in fact, the original understanding was virtually written out of the Constitution by the United States Supreme Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

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[1]The words "privileges" and "immunities" first appear in the Constitution in article IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). By virtue of Article IV, state citizenship carries with it the right to nondiscriminatory treatment within each state of citizens of all the states.

Consistent with the text and for purposes of distinction, the Article IV clause will be referred to as the "Privileges *and* Immunities Clause," and the Fourteenth Amendment clause will be referred to as the "Privileges *or* Immunities Clause."

[2]It is widely agreed that section 1 of the Fourteenth Amendment was intended at least to empower Congress to pass the Civil Rights Act of 1866, ch. 31, 14 Stat. 27. William Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 104 (1988) ("Section one was added to the amendment at least in part to remove doubts about the constitutionality of the 1866 act."); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1389 (1992). Many commentators have suggested that the amendment actually writes the substance of the 1866 Act into the Constitution. *See id.*

In the *Slaughter-House Cases*, decided in 1873, a majority of the Court acknowledged the Privileges or Immunities Clause of the Fourteenth Amendment, but limited its effects to those rights earlier existing under Article IV, without recognizing the creation of a new national citizenship. In his opinion for the Court in *Slaughter-House Cases*, Justice Miller declared that the rights conferred by national citizenship were those "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[3] 83 U.S. (16 Wall.) at 79. A review of the legislative history, however, will not permit such an ambivalent view.[4] The statements of the framers of the Fourteenth Amendment, Senator Howard and Representative Bingham, confirm that the Privileges or Immunities Clause was originally intended to confer and make inviolate certain minimal rights embodied in national citizenship.[5]

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[3]Subsequent cases suggested an even narrower definition of the rights of national citizenship, but in *Twining v. New Jersey*, 211 U.S. 78 (1908), the Court in dictum finally settled on the *Slaughter-House* definition as correct.

[4]As Justice Field observed in dissent, and it is not really possible to deny:

> If this inhibition . . . only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.

Slaughter-House Cases, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

[5]As Senator Howard stated: "it is certain the clause was inserted in the Constitution for some good purpose." Cong. Globe. 39th Cong., 1st Sess., part 3, p. 2765 (1866); *see generally* John H. Ely, Democracy and Distrust 22 (1980).

The Fourteenth Amendment Privileges or Immunities Clause was patterned after a similar clause in Article IV, Section 2.[6] The Fourteenth Amendment Clause was thought by its framers to be one of the central elements of section 1. Cong. Globe, 39th Cong., 1st Sess., part 3, p. 2765 (1866) ("This is the first clause, and I regard it as very important.") (statement of Senator Howard); *see generally* John H. Ely, Democracy and Distrust 22 (1980) (hereinafter "Ely"); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992).

The Article IV Privileges and Immunities Clause imposes substantive limits upon the states. *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D.Pa. 1825). In *Corfield*, Justice Washington held that this clause protected against state action the privileges "which are, in their very nature, fundamental; which belong, of right, to the citizens of all free governments."[7] *Corfield*, 6 F. Cas. at 551. Washington went on to state:

> What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire

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[6]Representative Bingham, the Congressperson who framed the Privileges or Immunities Clause of the Fourteenth Amendment, pointed to the Privileges and Immunities Clause of Article IV as his model. Cong. Globe, 39th Cong., 1st Sess., part 2, pp. 1033-34 (1866).

[7]As Ely has observed, the drafters of the Fourteenth Amendment "repeatedly adverted to the *Corfield* discussion as the key to what they were writing." *See* Ely at 29; Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507, 555-56 (1991). *Corfield* was invoked by both Senator Trumbull and Representative Wilson, the managers of the Civil Rights Act, to explain the fundamental rights of citizenship secured by the Act. Similarly, Senator Howard quoted from *Corfield* during the Congressional debates regarding adoption of the fourteenth amendment. Cong. Globe, 39th Cong., 1st Sess., part 3, p. 2765 (1866).

> and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Id. at 551-52.

It was this opinion which became the pole star for Representative Bingham and Senator Howard, the framers of the Fourteenth Amendment. Presenting the Fourteenth Amendment to the Senate, Senator Howard disclosed "the views and the motives which influenced that committee," stating:

> To [the privileges and immunities listed in *Corfield*], whatever they may be -- for they are not and cannot be fully defined in their entire extent and precise nature -- to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; *the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people*; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search and seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.
>
> . . . it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. . . . *The great objective of the first section of this amendment is, therefore, to restrain the power of the States and compel*

them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess., part 3, pp. 2765-66 (1866) (emphasis added).

Senator Howard's list of privileges or immunities, which incorporated *Corfield*, was representative rather than exhaustive. No case has ever attempted to identify the totality of implied federal rights guaranteed by the Privileges or Immunities clause. However, in *Twining v. New Jersey*, 211 U.S. 78 (1908), the Supreme Court did provide a list of privileges or immunities which it recognized: (1) the right to pass freely from state to state;[8] (2) *the right to petition Congress for redress of grievances*; (3) the right to vote for national officers; (4) the right to enter the public lands; (5) the right to be protected against violence while in the lawful custody of a United States Marshal; and (6) the right to inform United States authorities of violation of its laws. *Twining*, 211 U.S. at 97. These rights of national citizenship receive absolute protection in the sense that the states never could have a legitimate interest in terminating completely any of these rights. Rotunda & Nowak, Treatise on Constitutional Law 351 (2d ed. 1992).

III

The United States Supreme Court has repeatedly held that the right to vote is fundamental to the rights of citizenship and to a free and democratic society. *Burson v. Freeman*, 112 S. Ct. 1846, 1859 (1992); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1963); *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886). In *Evans I*, we held the right to participate equally in the political process to be a fundamental right. *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993).[9] By

[8]*See Edwards v. California*, 314 U.S. 160, 178 (1941), (the right of interstate travel is an essential "incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment . . . ").

[9]*See also Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Gordon v. Lance*, 403 U.S. 1, 5 (1971); Frank I. Michelman, *Conceptions*

"participate equally," although not assuring any political result, we did contemplate the right of the people peaceably to assemble and petition the government for a redress of grievances. This right to participate, an attribute of the new national citizenship, was meant by the framers of the Fourteenth Amendment to be a personal right guaranteed and secured by the Privileges or Immunities Clause. *See* Cong. Globe, 39th Cong., 1st Sess., part 3, pp. 2765-66 (1866).

It should be axiomatic that the right peaceably to assemble and petition government implies the ability of the duly elected representatives to respond, if so persuaded or predisposed. Yet, if enforced, Amendment 2 provides that the state, acting "through any of its branches or departments, or any of its agencies, political subdivisions, municipalities or school districts," shall not "enact, adopt or enforce any statute, regulation, ordinance or policy" granting to citizens a "claim of discrimination" based on homosexual or lesbian status or sexual orientation. Because it would prevent the General Assembly or other legislative bodies from enacting or adopting certain new laws and bar the executive department and its agencies from enforcing existing laws, Amendment 2 effectively denies the right to petition or participate in the political process by voiding, *ab initio*, redress from discrimination. Like the right to vote which assumes the right to have one's vote counted, the right peaceably to assemble and petition is meaningless if by law government is powerless to act.

IV

Courts have been reluctant to develop a working constitutional analysis under the Privileges or Immunities Clause since the *Slaughter-House Cases*, and, unfortunately, have instead built upon the Equal Protection Clause and Due Process Clause. The Equal Protection Clause, burdened by a history and analysis beyond this context,[10] is not the most appropriate of the Fourteenth Amendment

of Democracy in American Constitutional Argument: Voting Rights, 41 Fla. L. Rev. 443, 459 n. 63 (1989).

[10]Historically, the Equal Protection Clause was called upon to protect insular minorities. Similarities undoubtedly exist between unlawful discrimination based on sexual orientation and that based on race or national

provisions for securing the right to participate equally in the political process and yet it is the primary mode of analysis relied upon by the majority in this case.[11]

Certainly all must now agree that the Fourteenth Amendment sought to protect citizens from oppression by state government. The Equal Protection Clause of that amendment mandates that rights afforded to some are granted equally to all. *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991). From time to time the acts of government intervene in the lives of its citizens. [12] Under the Equal Protection Doctrine, such government intervention is subjected to review, applying at least one of three standards: strict scrutiny, intermediate review, or rational basis analysis. The applicable standard of review to be applied depends upon the characteristics or

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origin. However, the record is uncertain as to whether, as a general matter, victims of discrimination based on sexual orientation share the same history or are subjected to a similar experience or condition as victims of racial or ethnic discrimination.

[11]The defendants argue that the participation in the political process plaintiffs seek is a particular end or the successful adoption of plaintiffs' views. I note, however, that the right to participate in the political process does not guarantee plaintiffs or any other qualified electors the success of any candidate or cause nor the state's embracement of particular ideas. This right simply guarantees access to the political process. Citizens may vote, petition or amend as a matter of right, but they cannot necessarily win as a matter of right.

Moreover, I am not unmindful that the state may deny the right to vote or participate in the political process as an operation of due process. *See, e.g., Moran v. Carlstrom*, 775 P.2d 1176, 1179 (Colo. 1989) (the General Assembly may place reasonable restrictions on the right to vote); *see also People v. Russo*, 713 P.2d 356, 360 (Colo. 1986) (jurors disqualified if they do not have the right to vote by reason of criminal conviction).

[12]Government intervention may take the form of agency action, legislation, constitutional amendment, or other conduct which has the effect of law.

attributes of the citizens involved. Under the Equal Protection Doctrine, when such governmental intervention occurs, such as with the enactment of Amendment 2 in this case, regardless of the standard applied, it is contemplated that certain abridgements of even fundamental rights are acceptable. For example, under the strict scrutiny test, the most exacting standard and that applied by the majority, state action is "constitutionally permissible [] if it is '*necessary* to promote a *compelling* state interest,' and [the state] does so in the least restrictive manner possible." Maj. op. at 10 (citations omitted) (emphasis in original).

Unlike the Equal Protection Clause, the Privileges or Immunities Clause guarantees citizens that certain fundamental rights of national citizenship are inviolate, absent due process.[13] The syntax of the Fourteenth Amendment Clause seems inescapably that of substantive entitlement. According to Ely, "the slightest attention to language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements." Ely at 24. The importance of the Privileges or Immunities Clause is that it does not require varying standards of review and that its protections are extended to *every* citizen.

V

Under Amendment 2, the rights of citizens "peaceably to assemble and petition the government for a redress of grievances" so as to participate freely and equally in the political process are compromised in a manner prohibited by the Fourteenth Amendment. Because these political rights are fundamental and inherent in national citizenship they are protected by the Privileges or Immunities Clause. Accordingly, I concur.

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[13]*See supra*, n.11.

Evans v. Romer, No. 94SA48
JUSTICE ERICKSON dissenting:

I respectfully dissent. In *Evans v. Romer*, 854 P.2d 1270 (Colo.) (*Evans I*), *cert. denied*, 114 S. Ct. 419 (1993), the majority crafted a new fundamental right that had never been recognized by the United States Supreme Court or by any court other than a federal district court in Ohio that relied on *Evans I*. Ironically, judicial review of Amendment 2 has accomplished exactly what the voters who passed Amendment 2 sought to prevent--the majority has effectively created a heightened protection for homosexuals, lesbians, and bisexuals.

In establishing what is essentially a new substantive due process right disguised as a previously unrecognized "fundamental right," the majority disregarded the warnings of Chief Justice Burger, who stated in his dissent to *Plyler v. Doe*, 457 U.S. 202, 244 (1982): "If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example." Chief Justice Burger stated:

> Were it our business to set the Nation"s social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children--including illegal aliens--of an elementary education. . . . However, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense." We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.

Id. at 242 (citations omitted).

The majority opinion has overlooked a crucial aspect of the case before us: we are not evaluating an act of the legislature or pronouncement of the executive--we are reviewing a constitutional amendment adopted by the people of the State of Colorado. While there are certainly some initiated constitutional amendments that a majority of the electorate may attempt to visit on a minority that will not pass constitutional scrutiny, we must not ignore the fact that we are reviewing the expressed will of the citizens of this state.

In *Evans I*, we remanded the case to the district court to determine whether the preliminary injunction sustained by a majority of this court should be made permanent. The district court, following *Evans I* with great precision, made extensive findings and made the preliminary injunction permanent. Nevertheless, people of homosexual, lesbian, or bisexual orientation have never been adjudicated to be a protected class and the right to participate equally in the political process has never been determined, apart from *Evans I*, to be a fundamental right. Accordingly, I would employ a rational relation standard to Amendment 2 and vacate the permanent injunction. For the reasons set forth in my dissent to *Evans I*, and for the reasons set forth below, I respectfully dissent.

I

The majority relies on *Evans I* and applies the strict scrutiny standard of review to Amendment 2 because it holds that the Equal Protection Clause of the United States Constitution guarantees the fundamental right to participate equally in the political process. Maj. op. at 4; *Evans I*, 854 P.2d at 1276. *Evans I* established this standard of review by assembling several United States Supreme Court decisions and interpreting their collective teachings as implying a new fundamental right. *See Evans I*, 854 P.2d at 1276 (citing voting cases, ballot access cases, and "cases involving attempts to limit the ability of certain groups to have desired legislation implemented through the normal political processes"). In my view, no fundamental right or suspect class is implicated by Amendment 2, and therefore the standard of judicial scrutiny applied by the majority is erroneous.

A

The majority in *Evans I* extensively reviewed many United States Supreme Court decisions to reach its conclusion, and emphasized a line of cases relating to citizen participation in the political process. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Gordon v. Lance*, 403 U.S. 1 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969). The majority in *Evans I* interpreted these cases to create the fundamental right to participate equally in the political process. Properly understood, however, these cases involve suspect

classifications and not the alleged fundamental right to participate equally in the political process.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), the United States Supreme Court addressed a violation of the Equal Protection Clause of the federal constitution. *Hunter* involved a city charter amendment that repealed a racial anti-discrimination ordinance and required voter action before such an ordinance could be enacted. *Id.* at 387. Although *Hunter* involved the political process, the Court invalidated the amendment because it created an unjustified distinction *based on race*. The Court held:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect," and subject to the "most rigid scrutiny." They "bear a far heavier burden of justification" than other classifications.

Id. at 391-92 (citations omitted). Courts and scholars reviewing *Hunter* have recognized that the holding was predicated on an unconstitutional racial classification. *See Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975) (stating that *Hunter* struck down an amendment that was based on a racial classification), *cert. denied*, 426 U.S. 940 (1976); *Lee v. Nyquist*, 318 F. Supp. 710, 718 (W.D.N.Y. 1970) ("The principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."), *aff'd*, 402 U.S. 935 (1971); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4 Dist. 1991) (stating that "*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"); Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 314 (1991) (noting that in place of a political process theory of equal protection review, racial classifications are and should be considered presumptively unconstitutional because they should be irrelevant to decision-making); Robert H. Beinfield, Note, *The Hunter Doctrine: An Equal Protection Theory that Threatens Democracy*, 38 Vand. L. Rev. 397, 405 (1985) (suggesting that the decision in *Hunter* is based on racial classifications).

In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Court applied *Hunter* and struck down a state-wide initiative to terminate the use of busing to achieve racial integration in the public schools. In finding that the initiative violated the Equal Protection Clause, the Supreme Court held:

> [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," thereby "making it *more* difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest."

Id. at 470 (emphasis in original) (citations omitted). The Court thus did not approve of "distinctions based on race" and struck down the initiative because it would have created additional burdens for a class of citizens who have had historical difficulty in changing the political process. *Id.* at 486. *See Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 563-65 (1990) (holding that members of a traditionally suspect class merit special protection); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (same); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (noting that special protection may be offered for "discrete and insular" minority groups).

A similar issue was addressed in *Crawford v. Board of Education*, 458 U.S. 527 (1982), which was announced on the same day as *Washington*. In *Crawford*, the Court upheld a state constitutional amendment that prohibited state courts from ordering mandatory student assignment or transportation. The Court stated that if the constitutional amendment employed a racial classification such as the classification in *Hunter*, the Court would apply the strict scrutiny standard of review, but found *Hunter* inapplicable because the amendment at issue did not "embody a racial classification." *Crawford*, 458 U.S. at 536-37.

The fact that the fundamental right created by the majority in *Evans I* has never been recognized by the Supreme Court is evident in two cases, *James v. Valtierra,* 402 U.S. 137 (1971), and *Gordon v. Lance,* 403 U.S. 1 (1971). In *James* and *Gordon,* the Court could have used the fundamental right found in *Evans I* and applied strict scrutiny review to strike down constitutional measures. Instead, in both cases, the Court upheld the provisions and refused to apply the strict scrutiny standard enunciated in *Hunter.*

In *James,* the Supreme Court upheld the validity of a California constitutional measure that prohibited state public bodies from developing, constructing, or acquiring low-income housing projects until voters approved of the project in a referendum. Thus, the citizens singled out in *James* were low-income people who would qualify for low-rent housing and therefore the Court did not apply strict scrutiny. The Supreme Court said:

> Unlike the case before us, *Hunter* rested on the conclusion that Akron"s referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." . . . Unlike the Akron referendum provision, it cannot be said that California"s Article XXXIV rests on "distinctions based on race." . . . The present case could be affirmed only by extending *Hunter,* and this we decline to do.

James, 402 U.S. at 140-41.

Similarly, in *Gordon,* the plaintiffs challenged West Virginia's constitutional provision that required a sixty-percent approval for any bonded indebtedness incurred by the political subdivisions of the state. As in *James,* the Supreme Court did not apply the strict scrutiny standard of review because:

> Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. . . . We are not, therefore, presented with a case like *Hunter,* . . . in which fair housing legislation alone was subject to an automatic referendum requirement. The class singled out in *Hunter* was clear--"those who would benefit from laws barring racial, religious, or ancestral discriminations."

Gordon, 403 U.S. at 5. *James* and *Gordon* demonstrate that strict scrutiny should not be applied to review a restriction on the political process unless the restriction singles out a discrete and insular minority.[1] The Supreme Court of the United States has never held, however, that the right to participate equally in the political process is a fundamental right.

B

The development of fundamental rights in our jurisprudence has never been a matter for ad hoc determination. *See Palko v. Connecticut,* 302 U.S. 319, 325 (1937) (stating that fundamental rights are those that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed"); *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977) (noting that fundamental rights are liberties that are "deeply rooted in this Nation's history and tradition"); *see also Bowers v. Hardwick,* 478 U.S 186, 191-92 (1986); *Griswold v. Connecticut,* 381 U.S. 479, 481-86 (1965). Fundamental rights must be explicitly or implicitly guaranteed by the United States Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 33-34 (1973). Among the fundamental rights delineated by the Supreme Court are the right to vote, the right to interstate travel, the right to privacy, and the guarantees contained in the First Amendment. *See Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 101 (1972) (First Amendment); *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969) (interstate travel); *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 670 (1966) (voting); *Griswold,* 381 U.S. at 484 (privacy).

The Court has been reluctant to recognize new rights as fundamental. *See Bowers,* 478 U.S. at 195 ("There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses], particularly if it requires redefining the category of rights deemed to be fundamental."); Geoffrey Stone, et al.,

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[1]Homosexuals, lesbians, and bisexuals have never been adjudicated to be a discrete and insular minority by the Supreme Court. *See High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 571 (9th Cir. 1990); *Dahl v. Secretary of the United States Navy,* 830 F. Supp 1319, 1323-25 (E.D. Cal. 1993).

Constitutional Law, at 831 (1986) (stating that the Court "has essentially frozen the list of 'fundamental' interests"). The Court has refused to declare education, housing, the right to refuse medical treatment, welfare payments, or governmental employment to be fundamental rights worthy of heightened constitutional protection. *See Cruzan by Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 280 (1990) (right to refuse medical treatment); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (employment); *Rodriguez*, 411 U.S. at 35 (education); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (welfare). Never before has any court recognized the right to participate equally in the political process as a fundamental right, the curtailing of which warrants strict judicial scrutiny.[2] "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Rodriguez*, 397 U.S. at 33.

It is crucial to note, however, that even though equal participation in the political process does not merit strict scrutiny analysis, the United States Constitution offers protection for those who may be adversely affected by legislation. When individuals or groups are singled out, as they have been here, they may still be protected by the Due Process Clauses or the Equal Protection Clause.[3] In this case, the class of citizens is protected by the Equal Protection Clause. Accordingly, Amendment 2 must be struck down only if its challengers can demonstrate that the legislation is not rationally related to a legitimate state interest.

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[2]Recently, however, a federal district judge, relying on *Evans I*, struck down an anti-gay-rights measure approved by Cincinnati voters. In *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, slip op. at 26 (S.D. Ohio Aug. 9, 1994), the federal district court declared that a City Charter Amendment was unconstitutionally vague and violated the First Amendment right of homosexuals to participate in the political process. See also *Equality Found. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993).

[3]When fundamental rights are denied to everyone, it raises due process concerns. When fundamental rights are denied to some individuals only, it raises equal protection concerns. The applicable standard in either case, however, is strict scrutiny.

II

During oral argument before this court, counsel for the plaintiffs-appellees asserted that even if strict scrutiny review were inappropriate, we should analyze Amendment 2 under a rational basis standard of review. Counsel noted that in *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2642 (1993), the Supreme Court did not engage in strict scrutiny review because it was not properly preserved at the lower levels and therefore urged this court not to preclude rational basis review by ruling merely under strict scrutiny standards. I find counsel's contention persuasive and therefore address Amendment 2 under a rational relation standard.

A

In reviewing an act of the legislature or a voter-mandated constitutional amendment that creates a classification involving neither a fundamental right nor suspect classes, a court will review the classification under the "rational basis" standard of review. *See Heller*, 113 S. Ct. at 2642; *Kadrmas v. Dickinson Public Sch.*, 487 U.S. 450, 462 (1988). Under the rational basis standard of review, the classification will be "upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Comm'n v. Beach Communication, Inc.*, 113 S. Ct. 2096, 2101 (1993); *see also Sullivan v. Stroop*, 496 U.S. 478, 485 (1990); *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *Dandridge*, 397 U.S. at 484-85. "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller*, 113 S. Ct. at 2642; *see also Nordlinger v. Hahn*, 112 S. Ct. 2326, 2331-32 (1992).

The inquiry into whether there is a rational basis for the classification, however, does not authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*). Instead, a classification that involves neither suspect classes nor fundamental rights is accorded a strong presumption of validity. *Beach Communication*, 113 S. Ct. at 2098; *Hodel v. Indiana*, 452 U.S. 314, 331-332 (1981); *Murgia*, 427 U.S. at 314.

Because of the strong presumption of validity, the purpose or rationale behind the legislation need not be articulated at any time. *Heller*, 113 S. Ct. at 2642; *Nordlinger*, 112 S. Ct. at 2334; *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959). Additionally, the party challenging the classification bears the burden of "negat[ing] every conceivable basis which might support it" whether or not it is supported by the record. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973); *see also Heller*, 113 S. Ct. at 2643.

In an effort to ensure that rational basis review does not become a "license for courts to judge the wisdom, fairness, or logic of legislative choices," *Beach Communication*, 113 S. Ct. at 2101, the reasons articulated are given great deference. *See Id.* at 2098 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991) ("In cases where a classification burdens neither a suspect group nor a fundamental interest, 'courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.'") (citation omitted); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 62 (1973) ("The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional."); *Dandridge*, 397 U.S. at 485 (noting that a classification does not fail because "in practice it results in some inequality") (citation omitted); *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific."); *see also* Laurence Tribe, *American Constitutional Law* 1440 (2d ed. 1988) ("Within very broad limits, courts have traditionally exhibited extreme deference to the legislative definition of 'the general good,' either out of judicial sympathy for the difficulties of the legislative process, or out of a belief in judicial restraint generally."); John Nowak, Ronald Rotunda, Nelson Young, *Constitutional Law* 596 (2d ed. 1983) ("A majority of the justices today will uphold governmental classifications under this standard unless no reasonably conceivable set of facts could establish a rational relationship between the classification and an arguably legitimate end of government."); Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 Temp. L. Rev. 937,

941 (1991) ("The rational basis test is notoriously weak. When applied, there is 'little doubt about the outcome; the challenged legislation is always upheld.'") (quoting *Murgia*, 427 U.S. at 319 (Marshall, J. dissenting)); *but see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447 (1985) (striking down on rational basis review a zoning law that prohibited mentally retarded individuals from residing in certain areas of town because the law was based on the "bare . . . desire to harm a politically unpopular group") (citation omitted). This is so because:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance, 440 U.S. at 97 (footnote omitted). Although the purposes and rationale of a voter initiative are even more difficult to assess than legislative pronouncements, initiatives passed by the citizens of the state which contain classifications not related to fundamental rights or suspect classes are also given deference. *See Gregory*, 501 U.S. at 470 (applying the rational basis standard to a constitutional restriction enacted by the people); *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991) (applying a rational basis test to measures adopted through a referendum).

It is the prerogative of the people of the State of Colorado, and not this or any other court, to weigh the evidence and determine the wisdom and utility of the purposes behind a measure adopted through the initiative process. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (stating that the Minnesota Supreme Court erred in substituting its judgment for that of the legislature). Thus, whether in fact Amendment 2 will meet its objectives is not the relevant question: the Equal Protection Clause is satisfied if the people of Colorado could have rationally decided that prohibiting homosexuals, lesbians, and bisexuals from enacting certain legislation

might further a legitimate interest. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 242 (1984); *Clover Leaf Creamery*, 449 U.S. at 466.

Amendment 2 was put to a plebiscite by initiative petitions and eventually won voter approval by 813,966 votes to 710,151 votes. Because Amendment 2 was a product of a vote of the citizens of Colorado, no purpose or rationale for Amendment 2 was explicitly set forth. *See MSM Farms*, 927 F.2d at 332 ("Because the law was adopted through the initiative and referendum process, there is little traditional legislative history regarding its purpose."). However, the state has articulated several rationale in this court and in the district court to establish that the interest behind Amendment 2 is not only a rational interest but also a compelling state interest.[4]

III

Although only one legitimate state interest rationally related to the state's goals for a constitutional amendment is necessary, the state has set forth several. The district court found that two rationale--the promotion of religious freedom and the promotion of family privacy--demonstrated compelling state interests, although it found that the means for achieving the interests were not narrowly tailored to achieve the objectives.[5] In my view, there are at least three

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[4]The district court found that the state alleged six compelling state interests: (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial and religious privacy; (5) preventing the government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of children.

[5]The district court applied the strict scrutiny standard of review which requires the state to prove that classifications affecting fundamental rights were necessary to promote a compelling or overriding interest which is narrowly tailored. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982) (noting that the classification must be "precisely tailored"); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (stating a classification involving a fundamental right must be a compelling state interest); *Shapiro v. Thompson*, 394 U.S. 618, 634

interests that satisfy the constitutional standard and those asserting the invalidity of Amendment 2 have not met their burden of demonstrating that there is no rational basis for the constitutional amendment.

A

The state asserts that the rational basis of Amendment 2 is that it prevents the government from interfering with religious privacy. The root of the state's contention is that under ordinances preempted by Amendment 2, individual landlords or employers, including churches, who have profound religious objections to homosexuality, would nonetheless be compelled to compromise those convictions under threat of government sanctions. Thus, Amendment 2 prevents any political body from enacting legislation that would hinder the right of individuals to choose who to rent to or who to employ on religious grounds. The district court found that "[p]reserving religious freedom is a compelling state interest" but that Amendment 2 was "not narrowly drawn to achieve that purpose in the least restrictive manner possible."

Freedom of individuals to practice and hold particular religious beliefs is among the highest values in our society. *See Murdock v. Pennsylvania*, 319 U.S. 105, 115-17 (1943); *Jones v. Opelika*, 319 U.S. 103, 104 (1943); *see also Martin v Struthers*, 319 U.S. 141, 149-50 (1943) (Murphy, J., concurring). It is not within the discretion of this or any court to determine which beliefs are valid because "courts are not the arbiters of scriptural interpretation." *United States v. Lee*, 455 U.S. 252, 257 (1982). In fact, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [free exercise] protection." *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). Not only is it impermissible for courts to determine the validity of religious practices and beliefs, but no government official or body may delineate what is a "proper" form of faith and require citizens to act in accordance with government-mandated religious standards. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any

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(1969) (noting that there needed to be a compelling reason for the government to restrict interstate travel).

fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein.").

Nevertheless, not all burdens on religion are unconstitutional. *Lee*, 455 U.S. at 257; *Thomas*, 450 U.S. at 718 (stating that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion"). Even the highest values, including religious freedom, must sometimes give way to the greater public good. *See Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Thus, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *Employment Div. v. Smith*, 494 U.S. 872, 883 (1990).

In this case, the state asserts that Amendment 2 is an attempt to protect religious freedom by precluding legislation that would threaten sanctions against those who would refuse to employ or rent to homosexuals, lesbians, and bisexuals. The state indicates several examples of instances in which individuals or groups were forced to set aside their religious beliefs based on legislative enactments protecting homosexuals. In Aspen, for example, section 13-98 of the sexual orientation ordinance required churches to open their facilities to homosexual organizations if the facilities were opened to any community organization. Churches apparently could not refuse to hire employees, including pastors or priests, on the basis of their sexual orientation. Similarly, Title 12 of the Boulder Municipal Code did not allow a church or religious organization with deeply held moral and religious views on the subject of homosexuality to refuse to hire someone based on his or her sexual orientation.

In my view, the state has a legitimate interest in protecting religious freedoms and Amendment 2 bears a rational relationship to that interest.

B

Although the district court found that the state did not have a compelling interest in deterring "factionalism," or "political fragmentation," the state does have a legitimate interest in promoting

state-wide uniformity and Amendment 2 is rationally related to that interest.

Prohibiting local action on matters affecting the entire state is advantageous inasmuch as the state has an interest in uniformity of regulation:

> The central inquiry implicit in the concept of pre-emption is whether there should be statewide uniformity in the regulation of specific conduct. If there is no need for statewide uniformity, there is no need for state law to preempt local power to regulate. . . This is the core of the preemption question--to consider, on the one hand, the need for statewide uniformity of regulation of a specific type of conduct, and, on the other hand, the need of local governments to be able to respond to local, as distinguished from statewide problems.

Daniel R. Mandelker & Dawn C. Netsch, *State and Local Government in a Federal System* 237 (1977); *see also* Osborne M. Reynolds, *Local Government Law* 120 (1982) (stating that the critical inquiry in the context of state preemption of local law is: "[I]s this an area where it is desirable to have a single, all-encompassing scheme of regulation, so that local laws--not just local laws that conflict with the state's, but *any* local laws--would unduly complicate the picture?"); Charles S. Rhyne, *The Law of Local Government Operations* § 19.11 (recognizing that preemption is rooted in the necessity of statewide uniformity of regulation).

In determining what is a matter of statewide concern, this court has not set forth a strict legal standard. Instead, we have determined the nature of the concern on an ad hoc basis. *See Denver & Rio Grande Western R.R. Co. v. City & County of Denver*, 673 P.2d 354, 358 (Colo. 1983). In *City & County of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990), we stated:

> Although we have found it useful to employ the "local," "mixed," and "state-wide" categories in resolving conflicts between local and state legislation, these legal categories should not be mistaken for mutually exclusive or factually perfect descriptions of the relevant interests of the state and local governments. Those affairs which

> are municipal, mixed or of statewide concern often imperceptibly merge.

State regulation is a matter of statewide concern in a broad variety of contexts. *See Robertson v. City & County of D nver*, 874 P.2d 325, 350 (Colo. 1994) (Erickson, J., dissenting).

In this case, the state has a legitimate interest in promoting Amendment 2 because it is a matter of statewide concern. Amendment 2 involves a matter of statewide concern because the public is deeply divided over the issue of homosexuality.[6] In fact, civil rights has never been the type of concern reserved exclusively for local governments.[7] By adopting Amendment 2, the people of the state have sought to ensure that the government will act on a uniform basis. Several local governments, such as Denver, Aspen, and Boulder enacted sexual orientation laws, while others did not. By voting to approve Amendment 2, the voters of Colorado indicated that they wanted a statewide resolution of the issue that had formerly only been locally regulated and subject to great debate. The citizens of the state have a right to the initiative process which resolves conflicts between municipal and local governments when the issue is a matter of statewide concern and the process is not repugnant to the constitution.[8] The Supreme Court has noted that "referendums

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[6]The issue of homosexuality and bisexuality is deeply controversial and divisive. Unlike race and sex, there is no national consensus that sexual orientation is an inappropriate basis for governmental, much less private, decisionmaking. A series of constitutional amendments and acts of Congress have authoritatively settled the place of race and sex in American life. The same simply cannot be said of non-traditional sexual orientation.

[7]For example, in 1989, the General Assembly passed a law prohibiting insurance companies from inquiring about or making coverage decisions on the basis of sexual orientation. *See* § 10-3-1104(1)(f), 4A C.R.S. (1993 Supp.). In 1992, the Colorado Civil Rights Commission went on record recommending legislation adding sexual orientation to the list of protected classes.

[8]Testimony of Harvard Government Professor Harvey Mansfield indicated that the use of the initiative process to enact Amendment 2 supported stability and respect for the political process, by giving "the people

demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[9] *James*, 402 U.S. at 141.

In my view, the state has a legitimate interest in promoting statewide uniformity in matters of statewide concern and Amendment 2 bears a rational relationship to that interest.

C

The state also contends that it has a legitimate interest in allocating its resources. Specifically, the state suggests that laws prohibited by Amendment 2 would drain the state's financial and labor resources set aside and budgeted for the protection of traditionally suspect classes and diminish respect for traditional civil rights categories.

In this case, the testimony reflected that, although there was no current statute that required the state to enforce civil rights legislation on behalf of homosexuals, lesbians, and bisexuals, any such statute would decrease the funding available to enforce existing laws

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a sense that . . . government is not alien to them, and that they can get together by their own initiative . . . to produce a result that gives them a sense of satisfaction and accomplishment."

[9]The Court in *James* went on to cogently state:

> But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

James v. Valtierra, 402 U.S. 137, 142 (1971).

protecting traditionally suspect classes.[10] For example, the investigative arm of the Civil Rights Commission has experienced steadily increasing demands upon a shrinking budget. Two out of the last three years, the Division has been unable to fulfill its part of a federally funded work-share agreement.[11] The Division received complaints from the black community that claims were not being thoroughly investigated and prosecuted. The state, therefore, reasonably postulates that a law requiring the protection of an additional group would further stretch scarce resources, and Amendment 2 protects the civil rights enforcement for traditionally suspect groups.[12] Thus, the decision of the people of the State of Colorado to allocate government resources in a particular manner is

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[10]In *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), the Supreme Court announced its standard for reviewing legislative enactments in the economic sphere:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

[11]Under the agreement, the Division works on a certain number of cases involving only federally-protected classes which, of course, does not include sexual orientation. The Division only met the goals last year because the Equal Employment Opportunities Commission reduced the number of cases necessary to satisfy the agreement.

[12]The United States Supreme Court has addressed the issue of fiscal concerns impacting certain rights. In *Plyler*, 457 U.S. at 222-24, the Court held that whatever savings might be achieved by the state by denying public education to undocumented aliens were insubstantial compared to the costs to the children, the state, and the nation of not educating them. In *Shapiro*, 394 U.S. at 618, and in *Graham v. Richardson*, 403 U.S. 365 (1971), the Court found fiscal integrity not to be a compelling interest balanced against the right to interstate travel and the right to welfare assistance to aliens. These cases are distinguishable as either fundamental rights cases or cases in which the object was saving money not a basic allocation of funds.

a legitimate state interest in this case. *See Dukes*, 427 U.S. at 303 (upholding a New Orleans ordinance noting that states have wide latitude in regulating their local economies); *James*, 402 U.S. at 143 (noting that a referendum procedure "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds" and therefore found that a referendum measure did not violate the Equal Protection Clause).

Additionally, the state has a legitimate interest in ensuring that the traditionally suspect classes remain respected. *See Crawford*, 458 U.S. at 539 ("And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities."). Professor Joseph Broadus testified that the addition of homosexuals to civil rights statutes or ordinances would lessen the public's respect for historic civil rights categories. Testimony also indicated that, unlike the traditionally suspect classes, homosexuals, lesbians, and bisexuals are a relatively politically powerful and privileged special interest group. Indeed, former Civil Rights Commission Chairman Ignacio Rodriguez testified that the inclusion of homosexuals as a suspect class would represent a "drastic departure" from the historical aims of the civil rights laws.

The State of Colorado, through entities such as the Colorado Civil Rights Division, has attempted to further the interest in remedying specific instances of sexual and racial discrimination through existing civil rights laws and enforcement programs. However, owing to the fiscal constraints which are inevitably a part of public administration, unlimited funds are not available for this purpose. Therefore, it is incumbent upon the state to set priorities for its enforcement efforts. In this case, the setting of priorities is a legitimate state interest and Amendment 2 is rationally related to that interest.

IV

In my view, the correct standard of judicial review of Amendment 2 is a rational basis standard of review. Additionally, the plaintiffs have not shown that Amendment 2 is not rationally related to the state's legitimate interest in protecting religious freedom, encouraging statewide uniformity in the law, and allocating resources.

Accordingly, I would reverse the decision of the district court and vacate the injunction. Therefore, I dissent.

APPENDIX C

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 92 CV 7223, Courtroom 19

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER as Governor of the State of Colorado, GALE NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants.

INTRODUCTION

On November 3, 1993, by a vote of 53.4% to 46.6%, the voters of the State of Colorado passed an initiated amendment to the Colorado Constitution referred to as Amendment 2. That amendment provides:

> **No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.** Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Nine days after the amendment was passed, plaintiffs, individuals, three home rule cities, and a school district, filed the instant action seeking to have Amendment 2 declared unconstitutional. Plaintiffs also sought and obtained a preliminary injunction prohibiting the amendment from becoming effective prior to court review. That injunction was upheld by the Colorado Supreme Court July 19, 1993 in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

In its ruling, the Colorado Supreme Court did more than merely affirm the granting of the preliminary injunction. By the terms of its ruling that court set the guidelines this court must apply in making its present decision. Certain parts of the Supreme Court opinion must be noted for they form the basis for the present ruling. The Colorado Supreme Court held:

> We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny. (Footnote omitted)

Evans, 854 P.2d at 1282.

Further, the Supreme Court ruled:

> Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter*, which singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations," *Hunter*, 393 U.S. at 391, 89 S.Ct. at 560, Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80, 83 S.Ct. 801,808, 9L.Ed.2d 821 (1963).

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 627, 89 S.Ct. at 1889. Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. By constitutionalizing the prescription that no branch or department, nor any agency or political subdivision of the state "shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . . [a] claim of discrimination," Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from

> participating equally in the political process. (Footnote omitted)

Id. at 1285.

By stating that "strict scrutiny is required," the Supreme Court established the burden of proof at the trial.

> Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that purpose in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217 102 S. Ct. 2382, 2395, 72 L.Ed. 2d 786 (1982).

Id. at 1275.

FINDING OF FACT AND CONCLUSIONS OF LAW REGARDING OFFERED COMPELLING STATE INTERESTS

By virtue of the Supreme Court ruling, the burden at trial was upon defendants to show at least one compelling state interest and to show that Amendment 2 was narrowly drawn to support that interest. This is an unusual placement of the burden of proof. Defendants presented six alleged "compelling state interests": 1) deterring factionalism; 2) preserving the integrity of the state's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing the government from interfering with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of our children. (Defendants' Trial Brief pp 3-4). The court will address each claimed compelling interest separately.

The first claimed compelling state interest is that Amendment 2 deters factionalism. In their trial brief Defendants describe what they mean by factionalism as follows:

> Amendment 2 does not purport to serve any interests outside of Colorado's borders; rather, it simply seeks to ensure that the deeply divisive issue of homosexuality

> does not serve to fragment Colorado's body politic. Amendment 2 eliminates city-by-city and county-by-county battles over the political issue of homosexuality and bisexuality. As a matter of law, therefore, Amendment 2 serves a compelling state interest by ending political fragmentation and promoting statewide uniformity on this issue.

(Defendants' Trial Brief, pp 60-61.)

As defined by defendants, "factionalism" means "political fragmentation" over a controversial political issue. Defendants therefore define a difference of opinion on a controversial political question as factionalism.

In support of this position defendants urge two cases, *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714, (1974), and *Anderson v. Celebreeze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed. 2d 547(1983). The word "factionalism" appears in both of those cases. The word "factionalism" is not used in either *Storer* or *Anderson* in the same way as defendants here seek to use it. Additionally, neither case is even critical of "factionalism" as it is used in those cases. Finally, deterring factionalism was not the compelling state interest urged in those two cases.

Both *Storer* and *Anderson* address state rules and regulations for placing the name of independent, meaning not Republican or Democratic, candidates on election ballots. The states in each case sought to justify their regulations by urging the compelling state interest of "political stability." The ruling in each case addresses the stability of political processes for established parties and independents to place candidates names on election ballots.

In both cases it is only "splintered parties and *unrestrained* factionalism" (emphasis supplied) which is criticized by the Supreme Court. Defendants here do not seek to deter "unrestrained" factionalism. The "factionalism" which defendants here argue about found to be a great strength of the American political process in the cases cited. In *Anderson* the Supreme Court endorses that which the defendants here seek to deter:

> By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the market place of ideas . . . . In short, the primary values protected by the First Amendment -- "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" (citation omitted) -- are served when election campaigns are not monopolized by the existing political parties.

Anderson, 460 U.S. at 794, 75 L.Ed.2d at 561.

The *Anderson* court made reference to its earlier decision in *Williams v. Rhodes*, 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5, (1968), another case dealing with state limitations on parties other than Republicans or Democrats in placing candidates names on election ballots, by repeating: "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Anderson*, 460 U.S. at 802, 75 L.Ed.2d at 566.

Defendants' own authorities encourage the "competition of ideas" with "uninhibited, robust and wide-open" political debate. Defendant seek to deter those very things as being "factionalism". The history and policy of this country has been to encourage that which defendants seek to deter.

Defendants first claimed compelling state interest is *not* a compelling state interest. The *opposite* of defendants' first claimed compelling interest is most probably compelling.

Defendants' second suggested compelling state interest is the preservation of the State's political functions. Witnesses were offered who testified about the "homosexual agenda" and the homosexual push for "protected status" and urged that this Amendment protected Colorado's political functions from being overrun by such groups. These witnesses included Will Perkins, Tony Marco, and Kevin Tebedo.

Mr. Perkins identified himself as a Chrysler dealer in Colorado Springs and Chairman of the Board of Colorado for Family Values (hereafter CFV), the organization that spearheaded the campaign for

Amendment 2. He indicated that CFV intended Amendment 2 to deny protected status to homosexuals and bisexuals. Mr. Marco identified himself as a free lance writer of mixed political heritage. He testified that at one time he was a Marxist-Leninist, that he had attended a number of colleges, ultimately earning a masters degree in creative writing, that in a sense he was the founder of CFV, and that Amendment 2 was his idea. He testified that Amendment 2 was a defensive measure to fend off state-wide militant gay aggression. The court's notes contain his term "militant gay aggression" no less than six times in his direct testimony alone. Mr. Tebedo identified himself as the paid executive director of CFV and one of its founders. He testified that the purpose of Amendment 2 was to prevent the government from declaring that homosexuals are entitled to protected class status. He made clear his belief that absent Amendment 2, affirmative action programs for homosexuals would somehow be implemented in Colorado.

Defendants' argument as to this claimed interest was based on the Tenth Amendment to the U.S. Constitution which grants the power to amend state constitutions to the states. Defendants argue that the people through their votes have decided to amend the Colorado constitution and that vote should end the discussion.

Both this court in its ruling granting the preliminary injunction and the Supreme Court in affirming that injunction made specific reference to the constitutional provisions granting the right and power of the people of Colorado to amend their Constitution. The very first footnote in the Supreme Court opinion reads:

> [1]Art. II, §1, of the Colorado Constitution proclaims that "[a]ll political power is vested in and derived from the people; all government of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Art. II, §2, provides that "[t]he people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, *provided, such change be not repugnant to the constitution of the United States.*" (Emphasis supplied)

Evans, 854 P.2d at 1272.

Also, the very last section of the majority opinion the Supreme Court once again acknowledged the significance of the election, *but* put that election in perspective:

> That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However, the facts remain that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections," *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943), and that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that is be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736, 84 S.Ct. 1459, 1474, 12 L.Ed.2d 632 (1964).

Evans, at 1286.

The evidence presented does not satisfy this court that there is militant gay aggression in this state which endangers the state's political functions. Similarly the evidence does not persuade the court that absent Amendment 2, homosexuals and bisexuals are going to be found to be a suspect or quasi-suspect class and afforded protections based on those classifications. Finally, Defendants' legal argument is not supported by federal or state case law, nor is it supported by the Colorado Constitution. Defendants' argument seems little more than a begging of the ultimate question to be answered. The second alleged compelling interest is not a compelling state interest.

The third interest claimed to be compelling is the preservation of the ability of the state to remedy discrimination against groups which have been held to be suspect classes. This claim is basically that there are insufficient fiscal resources available to the state to add another group to the rolls of those protected by existing civil rights laws or ordinances. Although not totally clear from defendants' presentation, this claim may relate in some way to Amendment 1 passed in the same election.

Mr. Thomas Duran, formerly of the Colorado City Rights Division, and Mr. Ignacio Rodriguez, formerly of the Colorado Civil Rights Commission, were both called to testify that without Amendment 2 there would be a dilution of protections afforded to existing suspect classes. This testimony was unclear because the absence of this amendment does not mean that gays have been added as a protected class to any statute. Similarly, Professor Joseph Broadus from the George Mason University School of Law testified that in his view the addition of gays to civil rights statutes or ordinances would lessen the public's respect for historic civil rights categories. He further testified that enforcement of civil rights protections for gays could result in a dilution of governmental resources allocated to protect those traditional civil rights.

Contrasted against this testimony was the testimony of Denver Mayor Wellington Webb and Brenda Tolliver-Locke, a Compliance officer charged with enforcing the Denver Anti-discrimination ordinance. Both testified that enforcing Denver's ordinance, which does not contain a sexual orientation provision, does not detract from enforcing other aspects of the same ordinance. The inclusion of sexual orientation in the Denver ordinance has not necessitated an increase of enforcement staff nor has it resulted in an increase in costs.

Plaintiffs also presented the testimony of Leanna Ware from the Civil Right Bureau of the State of Wisconsin. In 1982 Wisconsin became the first state to enact statutory prohibitions against discrimination based on sexual orientation. Ms. Ware testified that the sexual orientation cases under those Wisconsin statutes are a very small percentage of the total case load and have not limited enforcement of other parts of the Wisconsin statutes in any way.

The facts don't support defendants' position. Defendants' evidence was principally in the form of opinion and theory as to what *would* occur if a Denver type ordinance were adopted as a state statute. There is no such statute, nor is one proposed. Plaintiffs' evidence was based on what *has happened* over the course of eleven years in Wisconsin, and during the time in which the Denver ordinance has included a sexual orientation provision. Those actual experiences show that the presence of a sexual orientation provision has *not* increased costs or impaired the enforcement of other civil rights statutes or ordinance.

Additionally, the Court has a very real question as to whether fiscal concerns may rise to the level of a compelling interest. At least three U.S. Supreme Court cases have suggested that fiscal concerns do *not* reach such a level when weighed against fundamental or even less than fundamental rights. In *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed. 2d 786 (1982), the court was faced with an issue relating to public education of the children of undocumented aliens. The court in that case found that public education is *not* a fundamental right and that undocumented aliens were *not* a suspect class. Having made these two findings, the court nonetheless found that whatever savings might be achieved by the state denying public education to these undocumented aliens were insubstantial in the light of the costs to the children, the state, and the nation of not educating them. The other two cases which found fiscal integrity *not* to be a compelling interest balanced fiscal integrity with the right of interstate travel and right to welfare assistance to aliens. *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969), and *Graham v. Richardson*, 403 U.S. 365, 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971).

The Colorado Supreme Court has found the right invaded in this case to be fundamental, and this court now finds defendants' offered evidence of lack of fiscal ability unpersuasive in all respects.

Defendants' fourth alleged compelling interest is the prevention of governmental interference with personal, familial and religious privacy. Pastor Hasford Van of Boulder's Second Baptist Church testified about the possible impact of Boulder's ordinance on his church in view of the fact that there is no religious exception under that ordinance. By affidavit of John Gillespie, executive director of Rawhide Boys Ranch, New London, Wisconsin, defendants presented the experience of his institution under the Wisconsin statutes, especially as it related to employment of homosexuals. Personal privacy was addressed, at least tangentially, by several witnesses.

Preserving religious freedom is a compelling state interest. Religious freedom is protected by the First Amendment to the United States Constitution and by Article II, Section 4 of the Colorado Constitution. The ordinances from Aspen and Denver, have exceptions for religious beliefs. The issue of protecting religious freedom in the context of competing governmental interests has been discussed by the U.S. Supreme Court in *Bob Jones University v. United States*, 461 U.S. 574, 76 L. Ed. 2d 157, 103 S.Ct. 2017

(1983). The question in that case was whether non-profit private schools with racially discriminatory admission standards based on religious doctrine qualified as tax exempt organizations under the tax code. The Supreme Court concluded that private schools which employed such discriminatory policies were not tax exempt organizations. Recognizing the clash of interests and the impact of denying tax exempt status the Court held as follows:

> Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.
>
> The governmental interest at stake here is compelling. As discussed in Part II-B, supra, the Government has a fundamental overriding interest in eradicating racial discrimination in education (Footnote omitted) – discrimination that prevailed, with official approval, for the first 165 years of this Nation's Constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.

Bob Jones University, 461 U.S. at 603-604, 76 L. Ed. 2d, at 181.

In the present case, the religious belief urged by defendants is that homosexuals are condemned by scripture and therefore discrimination based on that religious teaching is protected within freedom of religion. In *Bob Jones University*, religious teaching was the basis for racial discrimination. The competing interest in the present case is the right to participate in the political process as outlined by the Colorado Supreme Court. On balance, this court concludes that the two rights, the religious right to discriminate and the homosexuals' right to participate in political process can coexist.

When the court finds that the defendants have presented a compelling state interest, the court is then charged with determining whether Amendment 2 is "narrowly drawn to achieve that interest in the least restrictive manner possible." *Evans* at 1275. In this case it is obvious that the amendment is not narrowly drawn to protect religious freedom. The narrowly focused way of addressing the Boulder ordinance is to add to it a religious exemption such as is

found in the Denver and Aspen ordinances, not to deny gays and bisexuals their fundamental right of participation in the political process. The court specifically finds that Amendment 2 is not narrowly drawn to accomplish the purpose of protecting religious freedom.

Several witnesses testified on the issue of family privacy. In addition to Messrs. Tebedo, Perkins and Marco, Mr. Robert Knight, Director of Cultural Studies of the Family Research Council, was called to testify about family privacy. He testified that the Family Research Council is a pro-family lobbying organization and he admitted he is an opponent of the gay rights movement. He also testified that a part of his job is to be interviewed by the media and to debate gay and lesbian leaders. His testimony was that gay rights advocates are seeking to destroy the family by, in part, seeking to remove special societal protections from the family. He opined that the media is pro gay and advised the court of what was being discussed on afternoon television talk shows.

The court would have to assume or speculate what the family is, according to Mr. Knight. He never defined the family, nor was he asked to provide a definition. If the Court assumes the family consists of a mother and father who are married and living together, and children from that marriage who live with their parents, more questions are raised than are answered. Does the family include parents who are divorced? Does it include a family where the parents are divorced and remarried? Does it include single parent families, or families created by second marriages with stepparents and stepchildren?

Most importantly, however, how does Amendment 2, which impacts on fundamental rights of an identifiable group, narrowly promote the goal of promoting family values? Seemingly, if one wished to promote family values, action would be taken that is pro-family rather than anti some other group. The tie-in between the interest of protecting the family and denying gays and bisexuals the right to political participation was not made by defendants' presentation.

Defendants failed to meet their burden as to the second prong of their claimed fourth compelling interest, showing that this

Amendment is narrowly drawn to achieve its purpose of protecting religious freedom or family privacy.

The general issue of whether personal privacy is a compelling state interest was not adequately established. The court can only speculate as to what defendants mean by personal privacy and how Amendment 2 protects such a right. Defendants have not carried their burden as to this alleged "compelling state interest."

Defendants' fifth compelling interest is the prevention of government from subsidizing the political objectives of a special interest group. Their strongest argument on this claim was:

> For example, if a landlord is forced to rent an apartment to a homosexual couple, the landlord is being forced to accept, at least implicitly, a particular ideology. (Defendants' Trial Brief p. 69).

No authority is offered for this fairly remarkable conclusion, and none has been found. Further, the logic of the argument is unclear. This claimed compelling interest was not supported by any credible evidence or any cogent argument, and the court concludes that it is not a compelling state interest.

The final interest urged is the promotion of the physical and psychological well-being of children. The defendants argue:

> The state has a compelling interest in supporting the traditional family because without it, our children are condemned to a higher incidence of social maladies such as substance abuse, poverty, violence, criminality, greater burdens upon government, and perpetuation of the underclass. (Defendants' Trial Brief p. 74)

If the compelling interest relates to protecting children physically from pedophiles, the testimony of plaintiffs' witness Dr. Carole Jenny is more persuasive than anything presented by defendants. Dr. Jenny practices at Denver's Children's Hospital and made a study of persons who sexually abused children who were brought to that hospital. She indicated that pedophiles are predominantly heterosexuals not homosexuals. If the compelling interest is in protecting the psychological well being of homosexual youth, the Court is unable to

discern how allowing discrimination against them by virtue of the Colorado Constitution promotes their welfare. Defendants have failed to present sufficient evidence to support this claimed compelling interest.

The defendants have presented evidence of only two compelling state interest that Amendment 2 serves, the promotion of religious freedom and the promotion of family privacy. As to those two interests the Amendment is not "narrowly drawn to achieve that purpose in the least restrictive manner possible." Defendants have failed to carry the burden assigned to them by the Colorado Supreme Court and therefore this Court concludes that Amendment 2 is unconstitutional as being violative of the fundamental right of an identifiable group to participate in the political process without being supported by a compelling state interest.

Plaintiffs' Claim of Suspect or Quasi-Suspect Class

The above ruling, however, is not the end of the matter. In one of their trial briefs plaintiffs admit that "if the defendants do not meet their burden of showing that Amendment 2 serves a compelling interest by the least restrictive means, then Amendment 2 must be held unconstitutional . . . ." (Plaintiffs' Trial Memorandum on Legal Standards for Determining Whether Amendment 2 Serves a Compelling State Interest Through The Least Restrictive Means, Footnote 1, p. 2). Notwithstanding the fact that the court has not ruled as plaintiffs suggest, they nonetheless seek to have the court rule on three additional matters. First they claim that homosexuals and bisexuals ought to be found to be a suspect class and entitled to strict scrutiny review for that reason. Second they claim that homosexuals and bisexuals ought to be found to be a quasi-suspect class and be entitled to heightened scrutiny review. Finally they claim that Amendment 2, even if subject to the least stringent standard of review, the rational basis review, ought to be found unconstitutional.

Plaintiffs' presentation seeking suspect class status may be new or a change of plaintiffs' initial position. The Supreme Court was unaware that plaintiffs were seeking suspect class status. That court noted, "That gay men, lesbians, and bisexuals have not been found to constitute a suspect class, (citations omitted) and that *plaintiffs do not*

claim that they constitute such a class do not render the Equal Protection Clause inapplicable to them." (Emphasis supplied). *Evans* at 1275.

Additionally, the question of whether plaintiffs had pled a claim of suspect or quasi-suspect class in a manner sufficient to place defendants on notice of those claims was the subject of a motion *in limine*. This Court ultimately denied the motion which sought to exclude evidence relating to the question of suspect of quasi-suspect class, and the Court will address those issues in this ruling.

Plaintiffs urge that this Court should find that the elements associated with a suspect class are present in the homosexual and bisexual community. Plaintiffs argue that those elements are: (1) common traits; (2) a history of discrimination; (3) especially vulnerable in society, and that; (4) the common trait is irrelevant to individual merit. This set of elements is a re-definition or amalgamation of elements from other cases. No case cited contains these four elements. In order to persuade the court, plaintiffs filled the witness stand with doctors, psychiatrists, genetic explorers, historians, philosophers, and political scientists. Having chosen to present these types of witnesses, defendants felt obliged to respond in kind.

Standards for determining whether a group may be considered a "suspect" or "quasi-suspect" class have been discussed in various opinion.

> To be a "suspect" or "quasi-suspect" class, homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right. *Bowen v. Gilliard*, 483 U.S. 587, 602-603, 107 S.Ct. 3008, 3018, 97 L.Ed. 2d 485 (1987)

High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio School District v. Rodriguez, 411 U.S. 1, 28, 36 L.Ed.2d 16, 41, 93 S.Ct. 1278 (1973) (same language quoted with approval in *Massachusetts Board of Retirement v. Murgia*, 427 U.S 307, 313, 49 L.Ed.2d 520, 525, 96 S.Ct. 2562).

In applying these standards to homosexuals and bisexuals, no appellate court has yet found them to be either a "suspect" or quasi-suspect" class. *Ben-Shalom v. March*, 881 F.2d 454 (7th Cir. 1989) (attempted re-enlistment in military by lesbian); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (secret and top-secret security clearances for homosexuals); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (Homosexuals seeking to be hired by the FBI); *Bowers v. Hardwick*, 478 U.S. 186, 92 L.Ed.2d 140, 106 S.Ct. 2841 (1986) (attack on constitutionality of the Georgia sodomy statute by homosexuals). *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (release of homosexual member of Navy reserve from active duty). It also bears noting that to date the Supreme Court has only recognized three classifications as suspect and two as quasi-suspect.

> However, the Supreme court has recognized only three classifications as suspect: race, *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967), alienage, *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971); *but see Ambach v. Norwick*, 441 U.S. 68, 72-75, 99 S.Ct. 1589, 1592-93, 60 L.Ed.2d 49 (1979), and national origin, *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); and two others as quasi-suspect: gender, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-24, 102 S.Ct. 3331, 3335-36, 73 L.Ed.2d 1090 (1982), and illegitimacy, *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978).

Padula, at 102.

Plaintiffs called Dr. Richard Green, a psychiatrist specializing in human sexuality, Dr. Marcus Conant, a Board Certified Dermatologist whose practice consists mainly of treating AIDS patients in San Francisco, and Dr. Dean Hamer, a molecular biologist and genetic explorer, each of whom testified from the perspective of his discipline that homosexuals have certain common traits. Dr. Ted Marmor, an expert in psychiatry testified as to his opinion that homosexuality has no single cause but that there is probably some genetic cause and some early environmental, sociological cause. They called Professor Burke Marshall a law professor from Yale who was centrally involved in drafting Title VII of the 1964 Civil Rights Act, and Professor George Chauncey a History professor from the University of Chicago to discuss the history of discrimination against homosexuals and bisexuals. They offered Professor Kenneth Sherrill to describe gays' and bisexuals' vulnerability in society and to discuss their political powerlessness. All of their witnesses in one way or another testified that a person's homosexuality or bisexuality is not relevant to the merit of the individual.

One of the hot debates among witnesses addressed the question of whether homosexuality is inborn, a product of "nature", or a choice based on life experiences, a product of "nurture". Plaintiffs strongly argue that homosexuality is inborn. All the suspect and quasi- suspect classes, race, alienage, national origin, gender and illegitimacy, are inborn. Defendants argue that homosexuality or bisexuality is either a choice, or its origin has multiple aspects or its origin is unknown. The preponderance of credible evidence suggests that there is *a* biologic or genetic "component" of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure there is *some* genetic influence in forming sexual orientation, admits that sexual orientation is not completely genetic. The ultimate decision on "nature" vs "nurture" is a decision for another forum, not this court, and the court makes no determination on this issue.

The federal court in *High Tech Gays v. Defense Industrial Security Clearance Office*, *supra*, concluded that there is a history of discrimination against gays. That same court concluded that gays were *not* a suspect class, however, because they failed to establish two other required elements. This court concludes as did the court

in *High Tech Gays* that there is a history of discrimination against homosexuals.

The court cannot conclude, however, that homosexuals and bisexuals remain vulnerable or politically powerless and in need of "extraordinary protection from the majoritarian political process" in today's society. Failure to prevail on an issue in an election, such as Amendment 2 is not a demonstration of political powerlessness. Indeed, in the case of the vote on Amendment 2, the evidence supports a finding of the political power of gays and bisexuals. According to the figures presented to the court, more than 46% of the Coloradans voting voted against Amendment 2. Testimony placed the percentage of homosexuals in our society at not more than 4%. If 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness. The President of the United States has taken an active and leading role in support of gays, and an increasing number of states and localities have adopted gay rights protective statutes and ordinances such as the three city ordinances in the present case. Because the gay position has been defeated in certain elections, such as Amendment 2, does not mean gays are particularly politically vulnerable or powerless. It merely shows that they lost that election. No adequate showing has been made of the political vulnerability or powerlessness of gays.

The evidence at trial was that there is no identifiable majority in American politics. Numerical majorities of whites, heterosexuals and women were identified, but each numerical majority is so internally divided that it does not form an effective political majority. Therefore, the evidence showed political majorities are formed through the process of coalition building on an issue by issue, or election by election, basis. Those coalitions come together or do not come together to the level of a majority. What was established to the satisfaction of this court is that gays and bisexuals though small in number are skilled at building coalitions which is the key to political power. They are not therefore politically vulnerable or powerless. Homosexuals fail to meet the element of political powerlessness and therefore fail to meet the elements to be found a suspect class.

Case law has not clearly differentiated between the elements of a "suspect" class and a "quasi-suspect" class. Plaintiffs similarly have not established to the satisfaction of this court what those elements are, how they are distinguished from a suspect class, and how they

apply to homosexuals and bisexuals. There are two recognized "quasi-suspect" classes, gender and illegitimacy. Neither of the existing quasi-suspect classes encompass homosexuals and bisexuals. No real effort was put forth to establish that homosexuals and bisexuals fit the existing definitions. Plaintiffs have failed to carry their burden to establish that homosexuals are a quasi-suspect class.

USE OF RATIONAL BASIS TEST

Finally, plaintiffs ask that this court address Amendment 2 using the rational basis test. The Colorado Supreme Court has ruled that Amendment 2 invades a fundamental right of an identifiable group and that the test to be applied is the strict scrutiny test. The rational basis test is to be used when there is no fundamental right or suspect class involved. Therefore this court declines to apply a legally inappropriate test to this case.

The court notes that two recent cases have applied a rational basis test to excluding homosexuals from the military. In each case, however, no fundamental right was involved. *Dahl v. Secretary of U.S. Navy*, 830 F. Supp. 1319 (E.D. Cal. Aug. 30, 1993) and *Steffan v. Aspin*, 1993 W.L. 465530 (D.C. Cir.) (November 16, 1993). Those cases examined the question of homosexuality in the military and addressed the historic "military deference" which has been part of earlier decisions in the area. Both cases found there was no rational basis for excluding homosexuals from the military.

In *Steffan* Chief Judge Mikva pointed out that the case was different from *Bowers v. Hardwick*, 478 U.S. 186 in that *Bowers* dealt with homosexual conduct while *Steffan* dealt with homosexual orientation. He also acknowledged that whether an agency of the federal government can discriminate on the basis of sexual orientation "remains an open question," citing to *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986), aff'd in part and rev'd in part sub nom *Webster v. Doe*, 486 U.S. 592 (1988). Chief Judge Mikva further acknowledged that his decision in *Steffan* was only the beginning of the answer to that "open question." In *Dahl* the Federal District Court examined at length the application of the rational basis test to excluding homosexuals from the military and found the ban did not stand up to even that fairly minimal standard of review.

These cases do not impact on the present decision because of the fundamental right involved in the present case and the necessarily different standard of review.

JUDGMENT

Amendment 2 is found to be unconstitutional and the court orders that the preliminary injunction be made permanent.

So ordered this 14th Day of December, 1993.

BY THE COURT:

H. JEFFREY BAYLESS
District Court Judge

APPENDIX D

SUPREME COURT, STATE OF COLORADO
No. 93SA17 JULY 19, 1993

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

Appeal from the District Court, City and County of Denver
Honorable H. JEFFREY BAYLESS, Judge

EN BANC ORDER AFFIRMED

CHIEF JUSTICE ROVIRA delivered the Opinion of the Court.
JUSTICE ERICKSON dissents.

Defendants, Roy Romer, Governor of the State of Colorado, Gale A. Norton, Attorney General of the State of Colorado, and the State of Colorado (referred to collectively as "defendants") appeal the trial

court's entry of a preliminary injunction enjoining them from enforcing a voter-initiated amendment to the Colorado Constitution ("Amendment 2"). We affirm.

I

In May 1992, the requisite number of qualified voters submitted petitions to the secretary of state to present to the electorate a new section 30 to article II of the Colorado Constitution. The proposed constitutional amendment was put to the voters as Amendment 2 on November 3, 1992, and passed by a margin of 813,966 to 710,151 (53.4% to 46.6%).[1] The secretary of state certified the results on December 16, 1992, as required by article V, section 1, of the state constitution.

Amendment 2 provides:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

[1]Art. II, § 1, of the Colorado Constitution proclaims that "[a]ll political power is vested in and derived from the people; all government of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Art. II, § 2, provides that "[t]he people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States."

On November 12, 1992, Richard G. Evans, along with eight other persons ("individual plaintiffs"), and the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen ("governmental plaintiffs") (referred to collectively as "plaintiffs") filed suit in Denver District Court to enjoin the enforcement of Amendment 2 claiming that the amendment is unconstitutional. This contention was premised on several state and federal constitutional provisions.[2]

After plaintiffs' request for an expedited hearing on the merits was rejected, they filed a motion seeking to preliminarily enjoin the enforcement of Amendment 2 which was to go into effect on or

[2]The individual plaintiffs claim that Amendment 2 violates their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution because it fails to rationally advance a legitimate governmental interest and because it places unique burdens on plaintiffs' ability to participate equally in the political process. They also challenged the amendment on numerous First Amendment grounds including that it violates their right to petition their government for a redress of grievances; that it violates their rights to free expression and association; that it violates the constitutional prohibition against the establishment of religion; and that it is unconstitutionally vague. They also alleged that the initiative process by which Amendment 2 was passed violates the Guarantee Clause of Article IV, Section 4, of the United States Constitution. Lastly, the individual plaintiffs allege that Amendment 2 prohibits state courts from enforcing statutes, regulations, ordinances, and policies concerning discrimination based on sexual orientation and therefore, violates the Supremacy and Due Process Clauses of the Federal Constitution and art. II, § 6, of the Colorado Constitution.

Two of the governmental plaintiffs urge that Amendment 2 be construed so as not to affect their home rule powers. The Boulder Valley School District RE-2 asserts that Amendment 2 may violate local control over educational policies protected by art. IX, § 15, of the Colorado Constitution. All of the governmental plaintiffs claim that the amendment subjects them to potential liability under the Supremacy Clause of the Federal Constitution.

before January 15, 1993.[3] In support of this motion, plaintiffs argued that Amendment 2 deprives them of the First Amendment right of free expression and their Fourteenth Amendment right to equal protection of the laws. The First Amendment claim was based on the contention that Amendment 2 eliminates all potential means of redress for private retaliation or discrimination against gay men, lesbians, and bisexuals. Accordingly, the First Amendment requires the government to demonstrate a compelling justification for exposing those who engage in expressive conduct to increased risk. This burden, plaintiffs maintained, could not be met by the state. The trial court neither addressed nor relied on this argument in rendering its decision.

Plaintiffs presented two separate arguments under the Equal Protection Clause. First, that Amendment 2 violates their right to equal protection of the laws insofar as it denies gay men, lesbians, and bisexuals the opportunity to participate equally in the political process. Second, that Amendment 2 lacks a rational basis for the burdens it imposes on gay men, lesbians, and bisexuals.

The trial court conducted an evidentiary hearing to consider the motion. Following its conclusion, the court issued a temporary restraining order. The next day, the trial court held that plaintiffs had met their burden under the six-part test of *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982), which sets forth the applicable standard for the issuance of a preliminary injunction and accordingly, granted plaintiffs' motion barring the enforcement of Amendment 2 pending the outcome of a trial on the merits.[4]

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[3]Art. V, § 1, of the Colorado Constitution provides that state constitutional amendments passed via the initiative process "shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed."

[4]Under *Rathke*, before a trial court may issue a preliminary injunction, "the moving party must establish, as a threshold requirement, a clear showing that injunctive relief is necessary to protect existing . . . fundamental constitutional rights." *Rathke*, 648 P.2d at 653. If this threshold requirement is met, the trial court must find that the moving party has demonstrated: a reasonable probability of success on the merits; a danger of

More specifically (and of central importance to this appeal) the trial court concluded that plaintiffs had met the threshold requirement of *Rathke* by demonstrating that enjoining the enforcement of Amendment 2 was necessary to protect their right to equal protection of the laws under the United States Constitution. The court reached this conclusion by reasoning that Amendment 2 "may burden fundamental rights of an identifiable group." The fundamental right, the court went on, was "the right not to have the State endorse and give effect to private biases."[5]

The trial court then determined that because Amendment 2 may burden a fundamental constitutional right, its constitutionality must be assessed by reference to the "strict scrutiny" standard of review. The court concluded that under this standard, plaintiffs had shown to a reasonable probability that Amendment 2 would be demonstrated to be unconstitutional beyond a reasonable doubt at a trial on the merits. *See Bollier v. People*, 635 P.2d 543, 545 (Colo. 1981) (statutes are presumed constitutional until and unless the contrary can be shown beyond a reasonable doubt).[6]

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real, immediate, and irreparable injury which may be prevented by injunctive relief; that there is no plain, speedy, and adequate remedy at law; that the granting of a preliminary injunction will not disserve the public interest; that the balance of equities favors the injunction; and that the injunction will preserve the status quo pending a trial on the merits. *Id.* at 653-54.

[5]The trial court cited *Palmore v. Sidoti*, 466 U.S. 429 (1984) and *Reitman v. Mulkey*, 387 U.S. 369 (1967), as the primary support for this conclusion. The court quoted the Supreme Court's statement in *Palmore* that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect," *Palmore*, 466 U.S. at 433, and stated that *Reitman* stood for the proposition that it was unconstitutional to take "private discrimination and . . . [give] state support to it."

[6]We note that this presumption is all the more forceful in the context of a constitutional amendment. This is the case not only because here we deal with a constitutional provision as opposed to a statute, but in recognition of the broad powers which our state constitution places in the people. *See supra* note 1.

Defendants appealed pursuant to C.A.R. 1(a)(3), and we granted review. The basis of defendants' challenge to the preliminary injunction pertains only to the trial court's determination that the threshold requirement of *Rathke v. MacFarlane* had been met (*i.e.*, that injunctive relief is necessary to protect existing fundamental constitutional rights). Accordingly, the gravamen of defendants' allegation of error is their contention that the trial court "did not base its decision on any direct precedent," but rather "extrapolated from several federal court decisions" the right identified and allegedly infringed by Amendment 2. Moreover, defendants argue, there is no applicable legal precedent or established right under the Equal Protection Clause of the United States Constitution which Amendment 2 can be shown to infringe upon. Defendants conclude, therefore, that "the lower court's order was fundamentally flawed, and cannot be sustained."

Plaintiffs have presented to this court the same equal protection arguments that were made to, but not relied on by, the trial court. They do not urge that we base our decision on the precise right identified and relied on by the trial court in rendering its decision. To the contrary, they have argued to this court that the right identified by the trial court, when "read in light of the arguments actually presented to [it] . . . is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation . . . ." In short, plaintiffs urge us to rely only on the equal protection arguments which they have relied on, and that the trial court's ruling should be construed to have done the same.

Before turning to the merits, we first set forth the applicable standard of review which governs our decision.

II

"The grant or denial of a preliminary injunction is a decision which lies within the sound discretion of the trial court." *Rathke*, 648 P.2d at 653. Consequently, an appellate court reviewing the issuance of a preliminary injunction will usually do so with great deference to the conclusion reached by the lower court. Only if the lower court's ruling was manifestly unreasonable, arbitrary, or unfair will an appellate court ordinarily substitute its judgment for that of the lower court. *People v. Milton*, 732 P.2d 1199, 1207 (Colo. 1987). Where

the issue under review on appeal concerns only legal, as opposed to factual, questions however, the lower court's judgment is subject to independent review on appeal. *See Bloomer v. Board of County Comm'rs of Boulder County*, 799 P.2d 942, 944 (Colo. 1990) (appellate courts need not defer to trial courts when reviewing questions of law).

The question before us is whether the trial court properly determined that the threshold requirement of *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1987), had been met by plaintiffs. Since that requirement pertains only to whether an existing constitutional right is infringed by Amendment 2, the question we review is strictly a question of law. *Lafferty v. Cook*, 949 F.2d 1546, 1550 (10th Cir. 1991) (constitutional standard is a question of law subject to *de novo* review on appeal), *cert. denied*, 112 S. Ct. 1942 (1992). Consequently, we independently review the question of whether Amendment 2 has been shown to violate an existing constitutional right.[7]

III

It is important to stress at the outset that the Equal Protection Clause of the United States Constitution applies to all citizens, and not simply those who are members of traditionally "suspect" classes such as racial or ethnic minorities. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). That gay men, lesbians, and bisexuals have not been found to constitute a suspect class, *see, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (homosexuals neither a suspect nor quasi-suspect class); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989)

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[7]It is important to note in this context that the parties agree that in reviewing the order of the trial court, we are not limited to assessing only the right identified and relied on by the trial court in reaching its conclusion. Rather, a party "may defend the judgment of the trial court . . . on any ground supported by the record, so long as the party's rights are not increased under the judgment." *Farmer's Group, Inc. v. Williams*, 805 P.2d 419, 428 (Colo. 1991). As noted above, the plaintiffs have presented the same arguments to this court as those made to, but not relied on, by the trial court.

(same), *cert. denied sub nom. Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same), *cert. denied*, 494 U.S. 1003 (1990), and that plaintiffs do not claim that they constitute such a class do not render the Equal Protection Clause inapplicable to them.

It is well settled that there are three standards which may be applicable in reviewing an equal protection challenge: strict scrutiny, intermediate scrutiny, and rational basis review. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985). The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne*, 473 U.S. at 440 (citations omitted).

Strict scrutiny review -- the most exacting standard of review under the Equal Protection Clause -- is reserved for statutes or state constitutional amendments that discriminate against members of traditionally suspect classes, *see, e.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin), or infringe on any fundamental constitutional right, *City of Cleburne*, 473 U.S. at 440. Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that interest in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

Intermediate review, which requires a showing that the law in question is substantially related to a sufficiently important governmental interest, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), has been applied in the context of laws which draw distinctions based on gender, *id.* at 723-24, and illegitimacy, *Lalli v. Lalli*, 439 U.S. 259, 265 (1978), but not to those laws which create differential treatment based on age, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

Thus, in reviewing the trial court's determination that the plaintiffs carried their burden of establishing the threshold requirement of *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), we first must determine which standard applies and second, whether Amendment 2 can be shown, under that standard, and to a reasonable degree of probability, to violate the guarantee of equal protection of the laws.

A

The right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our Republic up to the present time. *See* John Hart Ely, *Democracy and Distrust* 87 (1980) (the Constitution "is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with . . . process writ large -- with ensuring broad participation in the processes and distributions of government"); Note, *Developments in the Law: Elections*, 88 Harv. L. Rev. 1111, 1114 (1975) ("no institution is more central to the United States' system of representative democracy than the election").[8]

The value placed on the ability of individuals to participate in the political process has manifested itself in numerous equal protection cases decided by the Supreme Court over the last thirty years. These include the reapportionment cases, *see, e.g., Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964), cases concerning minority party rights, *see, e.g., Williams v. Rhodes*, 393

[8]Indeed, the significance of political participation is evidenced by the fact that nearly half the amendments to the Constitution adopted since 1791 have concerned the franchise and election procedures. *See* U.S. Const. amends. XII (prescribing the method of electing the President and Vice President), XV (prohibiting the denial of the franchise on the basis of race, color, or previous condition of servitude), XVII (providing for the right to vote directly for United States Senators), XIX (extending the franchise to women), XXIII (extending the franchise to residents of the District of Columbia), XXIV (abolishing the poll tax), XXVI (extending the franchise to 18-year-olds).

U.S. 23 (1968), cases involving direct restrictions on the exercise of the franchise, *see, e.g., Dunn v. Blumstein,* 405 U.S. 330 (1972); *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966), and cases involving attempts to limit the ability of certain groups to have desired legislation implemented through the normal political processes, *see, e.g., Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457 (1982); *Gordon v. Lance,* 403 U.S. 1 (1971); and *Hunter v. Erickson,* 393 U.S. 385 (1969). When considered together, these cases demonstrate that the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny.[9] *See Dunn v. Blumstein,* 405 U.S. at 336 ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). *See also,* Laurence H. Tribe, *American Constitutional Law* 1062 (2d ed. 1988) ("At their core, all voting-related rights are rights to participate in [the] process [of representative government], and the import of the process for our

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[9]Strict judicial scrutiny is warranted when participatory rights are infringed not only because a *fundamental* right is at stake, *see Kramer*, 395 U.S. at 626-29, but also because

> [t]he presumption of constitutionality and the approval given 'rational' classifications in other types of enactments[] are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Id. at 628. *See also Reynolds v. Sims*, 377 U.S. 533, 565 (1964). That is, the ordinary assumption which informs judicial review of legislation that "even improvident decisions will eventually be rectified by the democratic process[] and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted," *Vance v. Bradley*, 440 U.S. 93, 97 (1979), is rendered inapplicable when participatory rights are at issue.

system of government freights them with their indisputable moment.").

The Supreme Court has consistently struck down legislation which establishes preconditions on the exercise of the franchise. These cases, generally speaking, are the types which most clearly violate the guarantee of equal protection because the legislation under review has the effect of directly "[f]encing out," *Carrington v. Rash,* 380 U.S. 89, 94 (1965), certain classes of voters. Thus, the Court has held that the requirement that voters pay a poll tax, *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966), be civilians, *Carrington,* or have property or children, *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621 (1969), before they can exercise the right to vote runs afoul of the Equal Protection Clause. In reviewing this sort of legislative restriction on the franchise, the Court in *Kramer* expressed the standard of review and rationale for applying that standard in the following terms:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Kramer, 395 U.S. at 626-27.

As *Kramer* clearly demonstrates, the danger presented by such restrictive legislation is that it may deny "any effective voice in the governmental affairs which substantially affect their lives." *Id.* at 627. Thus, to the extent that legislation impairs a group's ability to effectively participate (which is not to be confused with successful participation) in the process by which government operates, close judicial scrutiny is necessitated.

This same emphasis on the value of equal participation emerges from a second group of cases which addresses the issue of reapportionment. In *Reynolds v. Sims,* 377 U.S. 533 (1964), for example, the Court acknowledged the importance of political

participation and the need for the most searching standard of judicial scrutiny when any effort is made to limit participation, in recognition of the fact that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("even the most basic [rights], are illusory if the right to vote is undermined").

Unlike the situations presented in *Carrington*, *Kramer*, and *Harper*, however, the *Reynolds* Court was not confronted with legislation which set a precondition on the right to vote -- no individual or group was precluded, or even impeded, from voting. Rather, the question presented in *Reynolds* concerned the Equal Protection Clause's bearing on participatory effectiveness, *i.e.*, the right to have one's vote be as meaningful as the votes of others.[10] Consequently, the Court's opinion in *Reynolds*, as well as in the other reapportionment cases, reflects the judgment that dilution in the effectiveness of certain voters' exercise of the franchise violates the guarantee of equal protection of the laws not simply because citizens are guaranteed the right to vote, but because that right must be preserved in a meaningful, effective manner. *Reynolds*, 377 U.S. at 565 ("each and every citizen has an inalienable right to full and effective participation in the political processes . . ."); *Board of Estimate of N.Y. v. Morris*, 489 U.S. 688, 693 (1989) (same). In short, equal protection requires that voters are able to exercise the right of franchise on an even footing with others. *See Gray v. Sanders*, 372 U.S. 368, 379-80 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

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[10]In *Reynolds* the Supreme Court held that under the Equal Protection Clause, "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579. The Court required "*substantial* equality" in recognition of the fact "that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." *Id.* at 577.

This principle has also been consistently relied on to strike down legislation in a third category of political participation cases -- the "candidate eligibility" cases. For example, the Supreme Court in *Williams v. Rhodes*, 393 U.S. 23 (1968), reviewed a series of Ohio statutes which "made it virtually impossible," for new political parties with widespread support, or an old party which enjoyed very little support, to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States. *Id.* at 24. The Court observed that the state statutes placed significant burdens on "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," because a "vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[11] *Id.* at 31. The Court, again applying the strict scrutiny standard of review, concluded that only a compelling interest could justify "imposing such heavy burdens on the right to vote and to associate," and held that Ohio had failed to make such a showing. *Id.*

Similarly, in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), Illinois statutes that discriminated against minority parties in local elections were held invalid under the Equal Protection Clause.[12] Applying the strict scrutiny standard, the Court invalidated the Illinois laws, holding that they unnecessarily restricted a constitutionally protected liberty, even while acknowledging that States have a legitimate interest in regulating the number of candidates that appear on a ballot.

The "precondition," reapportionment, and "candidate eligibility" cases are not dispositive of, or directly controlling on, our decision here, as Amendment 2 falls within none of those three categories of cases. Admittedly, those decisions addressed entirely distinct questions and constitutional problems from those presented here.

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[11]The Court also held that the Ohio laws burdened "the right of individuals to associate for the advancement of political beliefs . . . ." *Rhodes*, 393 U.S. at 30.

[12]The Illinois statutes in question drew a distinction between the requisite number of signatures by eligible voters needed to place an independent candidate or a new party on the ballot at the state level from the number required to do so at the local level.

Nevertheless, it would be erroneous to conclude that those decisions are entirely inapposite. In the course of invalidating the laws at issue in those cases, the Court consistently recognized the paramount importance of political participation in our system of government,[13] and articulated the fundamental principle which guided its decision in those cases: The Equal Protection Clause guarantees the fundamental right to participate equally in the political process and thus, any attempt to infringe on that right must be subject to strict scrutiny and can be held constitutionally valid only if supported by a compelling state interest. This principle is what unifies the cases, in spite of the different factual and legal circumstances presented in each of them. Thus, while all three categories of cases are distinguishable from the present controversy, the common thread which unites them with one another, and with the case before us, is the principle that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest.

This principle has received its most explicit, and nuanced, articulation in yet another category of cases where the legislation at issue bore a much closer resemblance to the question presented by Amendment 2. This category of cases involves legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters. In each case, the legislation was held to be violative of equal protection.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Supreme Court struck down a charter amendment enacted by the voters of Akron, Ohio, which required any fair housing ordinance to be approved by the electorate, whereas other ordinances could be enacted by the city council. The Court held that the Akron amendment deprived minority groups of equal protection because it "place[d] special burdens on racial minorities within the governmental process." *Hunter*, 393 U.S. at 391.

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[13]Indeed, in *Illinois State Board of Elections*, 440 U.S. at 184, Justice Marshall, speaking for the Court, stated that "for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

In reaching this conclusion, the Court recognized that the amendment was aimed at minority racial groups.[14] However, its opinion speaks to concerns which are broader than the repugnancy of racial discrimination alone. Thus, Justice White, speaking for the Court, noted that Akron was free to require a plebiscite as to "all its municipal legislation," but having chosen to do otherwise, he concluded that Akron could

> no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

Id. at 393 (emphasis added). It is significant to note that in support of this proposition, the Court did not rely on any precedent dealing with racial minorities in the context of voting but instead, cited *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Avery v. Midland County*, 390 U.S. 474 (1968), neither of which had anything to do with discrimination against racial, or any other traditionally suspect class of persons.

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[14]The *Hunter* Court noted that "[h]ere . . . there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters," *Hunter*, 393 U.S. at 389, and observed that "[b]ut for those who sought protection against racial bias, the approval of the City Council was not enough." *Id.* at 390. The Court acknowledged, however, that "[i]t is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end," *id.*, yet the Court also noted that the Akron amendment "nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.* at 391. Thus, the Court concluded that while the amendment was facially neutral, "the reality is that the law's impact falls on the minority." *Id.*

It is also notable that Justices Harlan and Stewart, both of whom dissented in *Reitman v. Mulkey*, 387 U.S. 369 (1967),[15] concurred separately to the majority opinion in *Hunter*. After articulating their disagreement with the *Reitman* Court, they observed that, unlike the California initiative, "the City of Akron [had] not attempted to allocate governmental power on the basis of any general principle." *Hunter*, 393 U.S. at 395 (Harlan, J., concurring).[16] To the

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[15]In *Reitman*, the Supreme Court invalidated an amendment to the California Constitution which had been passed by the initiative process. "Proposition 14" protected property owners' right to discriminate, on any grounds, in the sale or rental of their real property. The immediate effect of the amendment was to repeal existing state prohibitions on racial discrimination in housing and to prohibit the passage of similar measures in the future. *Reitman*, 387 U.S. at 374.

The Supreme Court held that Proposition 14 violated the Equal Protection Clause because it rendered "[t]he right to discriminate, including the right to discriminate on racial grounds . . . immune from legislative, executive, or judicial regulation at any level of the state government." *Id.* at 377.

[16]Justices Harlan and Stewart elaborated on the "general principle" theme as follows:

> The existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on equal protection grounds since they are founded on neutral principles. Similarly, the rule which makes it relatively difficult to amend a state constitution is commonly justified on the theory that constitutional provisions should be more thoroughly scrutinized and more soberly considered than are simple statutory enactments. Here, too, Negroes may stand to gain by the rule if a fair housing law is made part of the constitution, or they may lose if the constitution adopts a position of strict neutrality on the question. But even if Negroes are obliged to undertake the arduous task of amending the state constitution, they are not thereby denied equal protection. For the rule making constitutional amendment difficult is grounded in neutral principle.

contrary, the fair housing statute was passed with the "clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that [was] in their interest." *Id.* This, the concurring Justices concluded, violated the Equal Protection Clause.

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), presents another situation in which an issue important to a minority group was removed from consideration via the normal political process. In *Washington*, the Court considered the constitutionality of an initiative which attempted to prohibit local school districts from utilizing mandatory busing as a means of achieving desegregation.[17] Relying on *Hunter*, the Court held that the voters, in passing Initiative 350, had impermissibly interfered with the political process and unlawfully burdened the efforts of minority groups to secure public benefits. *Washington*, 458 U.S. at 467-70.

In reaching this conclusion, the Court embraced Justice Harlan's "neutral principles" formulation in *Hunter* and referred to it as the "simple but central principle," *id.* at 469, underlying the majority opinion in *Hunter*. More specifically, the Court held that the Fourteenth Amendment reaches political structures that "distort[] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* at 467. It also stated that "laws structuring political institutions or allocating political power according to 'neutral principles' . . . are not subject to equal protection attack . . . . Because such laws make it more difficult for *every* group in the community to enact comparable laws, they 'provid[e] a just framework within which the diverse political groups in our society may fairly compete.'" *Id.* at 470 (quoting *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (emphasis in

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Hunter, 393 U.S. at 394-95 (Harlan, J., concurring) (citation omitted).

[17]Prior to the passage of Initiative 350, which prohibited school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home (and set forth a number of exceptions to this rule), *see Washington*, 458 U.S. at 462-63, "the power to determine what programs would most appropriately fill a school district's educational needs--including programs involving student assignment and desegregation--was firmly committed to the local board's discretion." *Id.* at 479-80.

original)). In contrast, the initiative at issue in *Washington* did "not attemp[t] to allocate governmental power on the basis of any general principle," *id.* at 470 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)), but rather, used "the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities." *Id.*

Thus, while *Washington*, like *Hunter*, involved an initiative that affected a racial minority, and while this fact weighed heavily in the Court's consideration of this case, it would be erroneous to conclude that the "neutral principle" precept is applicable only in the context of racial discrimination. Indeed, such a reading of *Hunter* and *Washington* would be antithetical to the neutral principle itself, for the requirement of neutrality would in fact only be a requirement of nondiscrimination with respect to racial minorities -- and not at all a requirement that legislation must "attemp[t] to allocate governmental power on the basis of any general principle." *Id.* at 470 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)). Thus, while *Hunter* and *Washington* are indeed cases which involved racial minorities, the principle articulated in those cases clearly is not one that can logically be limited to the "race" context alone.[18]

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[18]In *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. Ct. App. 1991), the court, in reviewing a proposed ballot initiative whereunder "persons seeking protective legislation against discrimination based on sexual orientation or AIDS must attempt to persuade a majority of the voters that such an ordinance is desirable," concluded that:

> Precisely this arrangement was condemned in *Hunter v. Erickson* . . . in which the court invalidated an ordinance which similarly required voter approval for any ordinance prohibiting housing discrimination on the basis of race, religion, or ancestry.
>
> The court held that such an ordinance drew an impermissible "distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends". . . . Although the ordinance did not focus on members of minority groups, the court observed that "the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination

This was made clear in *Gordon v. Lance*, 403 U.S. 1 (1971). In *Gordon*, the Court upheld a West Virginia statute that required approval by a 60% majority of any proposed increase in bond indebtedness or state tax rates. Plaintiffs, a group of individuals who had voted in favor of two proposals covered by the 60% requirement, sought a declaratory judgment that the 60% requirement was unconstitutional under the Equal Protection Clause.[19]

The Supreme Court, in reversing the West Virginia Supreme Court of Appeals, turned its attention to the applicability of *Hunter*. The Court distinguished *Hunter* on the grounds that, unlike the West Virginia statute, which "applie[d] equally to all bond issues for any purpose, whether for schools, sewers, or highways," the municipal ordinance in *Hunter* subjected "fair housing legislation alone . . . to an automatic referendum requirement." *Gordon*, 403 U.S. at 5. Furthermore, unlike *Hunter*, where "[t]he class singled out . . . was clear--'those who would benefit from laws barring racial, religious, or ancestral discriminations,'" the Court was unable to discern any "independently identifiable group or category that favors bonded indebtedness over other forms of financing." *Id.* at 5. Thus, the Court concluded, "no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Id.* (citation omitted).

The significance of the *Gordon* Court's discussion of *Hunter* is twofold. First, it is meaningful that the issue in *Gordon* had nothing to do with racial minorities or any other traditionally suspect class, yet the Court felt compelled to discuss *Hunter*. In the course of that discussion, no mention was made of the fact that the West Virginia law was racially neutral, whereas the Akron law clearly was not. If, as the defendants suggest here, *Hunter* is a "race" case and nothing more, the Supreme Court could have summarily dismissed the notion

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. . . ."

[19]One proposal called for the issuance of general obligation bonds for the purpose of building a new school and improving existing educational facilities. The second proposal authorized the Board of Education to levy additional taxes to support current expenditures and capital improvements. *Gordon*, 403 U.S. at 3. Of the votes cast, 51.55% favored the bond issue and 51.51% favored the tax levy. *Id.*

that it was applicable in *Gordon*. The fact that the Court did not do so, however, strongly suggests that the holding of *Hunter* cannot be limited in application only to the review of legislation which discriminates on the basis of race.

Second, although the *Gordon* Court recognized that the Akron law singled out those who would benefit from laws barring racial, religious, or ancestral discrimination, no significance was placed on the nature of the class discriminated against in *Hunter*. Rather, the salient aspect of *Hunter* which distinguished it from the situation presented in *Gordon* was the absence of a group of voters that was "independently identifiable" apart from the group created by the statute itself.[20]

When taken together, these facts clearly support the conclusion that *Hunter* applies to a broad spectrum of discriminatory legislation. This becomes abundantly clear in light of the *Gordon* Court's articulation of the controlling constitutional standard: "We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause." *Gordon*, 403 U.S. at 7.[21]

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[20]In *Town of Lockport, N.Y. v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 268 n.13 (1977), the Court cited *Gordon* and *Hunter* as support for the proposition that "a referendum voting scheme that can be characterized in mathematical terms as giving disproportionate power to a minority does not violate the Equal Protection Clause, there being no discrimination against an identifiable class."

[21]In so concluding, we are mindful that a majority of the Supreme Court in *James v. Valtierra*, 402 U.S. 137 (1971), upheld the constitutionality of a California constitutional amendment that required majority approval in a community election for the construction of any low-rent housing project. The Court held that the mandatory referendum procedure, which was not limited to proposals for low-cost public housing, ensured democratic decisionmaking and did not violate the Equal Protection Clause. In reaching this conclusion, the Court declined to "extend" *Hunter* to a provision which was not "aimed at a racial minority." *James*, 402 U.S. at 141.

Three Justices dissented, not by taking issue with the majority's use of *Hunter*, but on the basis that the provision should be invalidated on the

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We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny.[22]

We reject defendants' contention that Amendment 2 cannot be understood to infringe on any recognized right protected under the Equal Protection Clause. We do so for a number of reasons. First, defendants urge that the authority relied on in reaching our conclusion, when "properly analyzed," recognizes a cognizable equal protection claim "only when the political process has been

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grounds that poverty is a suspect classification. It is significant to note that all of the Justices who joined in the majority opinion in *James* also joined the later opinion in *Gordon* (as did Justice Douglas who did not participate in *James*), which itself made no reference to *James*. The two Justices who dissented in *Gordon* (Justices Brennan and Marshall) did not do so on the basis of the majority's application of *Hunter*.

Thus, we are of the opinion that *James* is best understood as a case declining to apply suspect class status to the poor, and not as a limitation on *Hunter*.

[22]Professor Michelman characterizes the Supreme Court's jurisprudence in the participation cases as establishing that,

> by force of the equal protection clause, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction,". . . [T]hat this right is among those it classes as "fundamental,". . . so that any restriction of it "must be carefully and meticulously scrutinized,". . . to determine whether it is "necessary to promote a compelling state interest." Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla. L. Rev. 443, 459 n.63 (1989).

restructured to place unusual burdens upon racial groups, or, in the most expansive sense, [upon politically powerless groups]." This contention belies the fact that much of the authority relied on in reaching our conclusion did not involve racial groups.[23]

Moreover, as *Gordon v. Lance*, 403 U.S. 1 (1971), makes clear, and the language of *Hunter v. Erickson*, 393 U.S. 385 (1969), itself indicates, the principle that a "State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any groups smaller representation than another of comparable size," *Hunter*, 393 U.S. at 393, does not apply simply to racial minorities.

Finally, if the cases referred to above were decided solely on the basis of the "suspect" nature of the classes involved, there would have been no need for the Court to consistently express the paramount importance of political participation or to subject legislation which infringed on the right to participate equally in the political process to strict judicial scrutiny. To the contrary, were these simply "race cases," the Supreme Court would have been required to do nothing more than note that the legislation at issue drew a classification that was inherently suspect (*i.e.*, that discriminated on the basis of race), and apply strict scrutiny to resolve those cases -- irrespective of the right, entitlement, or opportunity that was being restricted. *Compare Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 n.9 (1969) ("we have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation") *with Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("It is enough to say that the classification involved in *Shapiro [v. Thompson*, 394 U.S. 618 (1969)] was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement.").

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[23]*See, e.g., Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Gordon v. Lance*, 403 U.S. 1 (1971); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

We similarly reject defendants' contention that the right of equal political participation "can only work when applied to suspect classifications . . . [for any broader application will] necessarily mandate[] that all legal and policy choices be made at the lowest governmental level possible." This argument is based on defendants' observation that the Colorado Constitution creates numerous burdens which, in order to be overcome, require a constitutional amendment, such as article XVIII, section 9, (permitting limited gaming only in Central City, Blackhawk, and Cripple Creek) and article XIX, section 2, (prohibiting the General Assembly from proposing amendments to more than six articles of the state constitution at the same session).

While defendants are correct in observing that there are constitutional provisions which create some barriers to those who might seek governmental action in conflict with these provisions, it cannot be said that the provisions cited by defendants isolate any "independently identifiable group," *Gordon v. Lance*, 403 U.S. 1, 5 (1971), from pursuing its political objectives. In fact, the precise argument defendants now advance was expressly rejected by the Supreme Court in *Gordon*. As noted above, the constitution and statutes at issue in *Gordon* required a 60% majority before certain bonds or tax levies could be passed. The Court, in refusing to apply the principle of *Hunter v. Erickson*, 395 U.S. 385 (1969), under the facts of *Gordon*, noted that "[i]n contrast [to the class singled out in *Hunter*] we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Gordon*, 403 U.S. at 5 (citation omitted). We find this reasoning both controlling and persuasive here. The same cannot be said, however, of Amendment 2.[24]

We therefore conclude that defendants' argument that the right to participate equally in the political process applies only to traditionally suspect classes is without merit. Similarly, we reject their argument that the above cited authorities are properly understood only as "suspect class" cases, and not "fundamental rights" cases. We turn, therefore, to the question of whether Amendment 2 has been shown, to a reasonable degree of probability, to infringe on the fundamental

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[24]*See infra* at 32-37.

right to participate equally in the political process beyond a reasonable doubt.

IV

In reviewing Amendment 2, we do so in light of its immediate objective, its ultimate effect, its historical context, and the conditions existing prior to its enactment. *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967).

The immediate objective of Amendment 2 is, at a minimum,[25] to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. *See* Aspen, Colo., Mun. Code § 13-98 (1977) (prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation); Boulder, Colo., Rev. Code § § 12-1-2 to -4 (1987) (same); Denver, Colo., Rev. Mun. Code art. IV, § § 28-91 to -116 (1991) (same); Executive Order No. D0035 (December 10, 1990) (prohibiting employment discrimination

[25]The parties sharply disagree on the scope of Amendment 2's provisions. For example, defendants argue that Amendment 2 "does not prevent the enforcement of rights derived from other sources including federal law; it allows enforcement of rights from private contracts; and does not prevent private companies [from adopting policies prohibiting discrimination based on sexual orientation]," and conclude that Amendment 2 "prohibits only the recognition or enforcement of state or locally created civil rights protections above and beyond those required by federal law." Plaintiffs, in contrast, argue that "defendants' interpretation bears little resemblance to the language of Amendment 2," and conclude that, on its face, the amendment clearly limits the sort of redress that defendants argue it does not.

The precise scope of Amendment 2 need not be determined here, however, because neither the parties, nor their amici, have contended that Amendment 2 does not prohibit the enactment of antidiscrimination laws by state or local entities. Since all agree that Amendment 2 unambiguously attempts to do this, and since that restriction alone provides a sufficient basis for our conclusion, we need not determine what broader application Amendment 2 might have.

for "all state employees, classified and exempt" on the basis of sexual orientation); Colorado Insurance Code, § 10-3-1104, 4A C.R.S. (1992 Supp.) (forbidding health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's sexual orientation); and various provisions prohibiting discrimination based on sexual orientation at state colleges.[26]

The "ultimate effect"[27] of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures. In the absence of such a constitutional amendment, any governmental entity would be acting contrary to the state constitution by "adopting, enacting, or enforcing" any such measure.

Thus, the right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.

Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter*, which singled out the class of persons "who would benefit from laws barring racial,

[26]Metropolitan State College of Denver prohibits college sponsored social clubs from discriminating in membership on the basis of sexual orientation and Colorado State University has an antidiscrimination policy which encompasses sexual orientation. *See* Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals (Research Publ. No. 369, p. 10, 1992).

[27]*See supra* note 25.

religious, or ancestral discriminations," *Hunter*, 393 U.S. at 391, Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 627. Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. By constitutionalizing the prescription that no branch or department, nor any agency or political subdivision of the state "shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . .[a] claim of discrimination," Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process.[28]

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[28]As for the State's contention that "[t]he plaintiffs continue to have the ability to participate fully in all of Colorado's political processes; what they do not have is a right to *successful* participation in the process," we think this misconstrues the nature of plaintiffs' participatory rights. While the State is quite right that the plaintiff class, like any other members of society, has no right to successful participation in the political process, the fact remains that its unsuccessful participation is mandated by the provisions of Amendment 2. In contrast to all other members of the electorate whose successful or unsuccessful participation in the process cannot be determined until ballots, votes, charters, etc., have been counted or voted upon, with the exception of a state constitutional amendment, gay men, lesbians, and bisexuals are told that "you can appeal to government on those issues of concern to you, but you will, by virtue of Amendment 2, lose -- irrespective

Prior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation.[29]

Thus, like any other members of the electorate, the political process was open to them to seek legislation or other enactments deemed beneficial in the same way it was open to all others. Were Amendment 2 in force, however, the sole political avenue by which this class could seek such protection would be through the constitutional amendment process. In short, Amendment 2, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution. Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause.

Because the defendants and their amici have not proffered any compelling state interest to justify the enactment of Amendment 2 at this stage of the proceedings as required under the strict scrutiny standard of review, *see Plyler v. Doe*, 457 U.S. 202, 217 (1982); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985), we conclude that plaintiffs have met their burden under *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982).

V

That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However, the facts remain that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections," *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943), and that "[a] citizen's constitutional rights can hardly be infringed

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of your ability to summon the support of others, or carry a majority in an election."

[29]Indeed, this class of persons had done precisely this with some measure of success. *See supra* at 33-34.

simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736 (1964).

We reject defendants' argument that the trial court erred in granting a preliminary injunction enjoining defendants from enforcing Amendment 2 pending a trial on the merits of plaintiffs' constitutional challenge.

Order affirmed.

JUSTICE ERICKSON dissents.

Evans v. Romer, No. 93SA17
JUSTICE ERICKSON dissenting:

I respectfully dissent. This is an appeal of a district court order granting a preliminary injunction that prohibits the Governor and the Attorney General from enforcing a voter- initiated amendment to the Colorado Constitution ("Amendment 2").[1] The issue before us is whether the district court for the City and County of Denver properly concluded that the appellees met the requirements set forth in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), and C.R.C.P. 65, for the issuance of a preliminary injunction. Because we are reviewing the district court's underlying legal premise for the injunction, we are obligated to apply a de novo standard of review. Based on that standard, I would reverse and discharge the preliminary injunction, and remand for trial on the permanent injunction.

The district court issued the preliminary injunction based on its conclusion that Amendment 2 must be evaluated under the strict scrutiny standard of review. The strict scrutiny standard of review was found to be applicable based on a *fundamental right* "not to have the State endorse and give effect to private biases" with respect to "an identifiable class." The district court's delineation of the fundamental right supporting the preliminary injunction has never been identified or recognized by the United States Supreme Court or by any other court. As such, the district court's recognition of a new fundamental right is based on an underlying legal premise that is erroneous.

The majority upholds the preliminary injunction and agrees that Amendment 2 should be evaluated under the strict scrutiny standard of review. Unlike the district court, however, the majority concludes that strict scrutiny applies based on the recognition of a different *fundamental right*, "the right to participate equally in the political process." Maj. op. at 14. In my view, based on the United States Supreme Court precedent cited in the majority opinion, the majority's conclusion is also erroneous.

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[1]A state constitutional amendment passed through the initiative process "shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed." *See* Colo. Const. art. V, § 1. The injunction was sought to prevent Amendment 2 from taking effect.

Since I cannot agree that Amendment 2 should be evaluated under the strict scrutiny standard of review based on Supreme Court precedent defining fundamental constitutional rights, I would reverse the district court and discharge the preliminary injunction.

I

On November 3, 1992, Amendment 2 passed by a margin of 813,966 to 710,151. Amendment 2 provides:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On November 12, 1992, the appellees filed suit to permanently enjoin the enforcement of Amendment 2, alleging that it violated provisions of both the Colorado and United States Constitutions. The appellees claimed, *inter alia*, that Amendment 2 violated (1) the rights to freedom of association and expression under the First Amendment; (2) the fundamental right to petition the government for redress of grievances; (3) the fundamental right to vote; and (4) the fundamental right to participate equally in the political process. After the district court rejected the request of the appellees for an expedited hearing on the merits, they filed motions to preliminarily enjoin the Governor and the Attorney General from enforcing Amendment 2.

The appellees based their motion for a preliminary injunction solely on the United States Constitution, claiming that Amendment 2 violated their First Amendment right to freedom of expression and

their Fourteenth Amendment right to equal protection of the laws.[2] In their motion, the appellees did not claim that Amendment 2 violated the Equal Protection Clause because a suspect class was involved.[3] Instead, the appellees based their equal protection

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[2]An amendment to the state constitution cannot be unconstitutional, unless and to the extent it violates the United States Constitution. *Cf.* Colo. Const. art. II, § 2; *Cooper Motors, Inc. v. Board of County Comm'rs*, 131 Colo. 78, 84, 279 P.2d 685, 688 (1955) ("[t]he people can do any thing by constitutional amendment unless prohibited by the terms of the Constitution of the United States").

[3]The majority recognizes that gay men, lesbians, and bisexuals constitute an "identifiable group." Maj. op. at 33. This conclusion is true, just as is the fact each of the three groups standing alone constitutes an identifiable group based on the sexual orientation and conduct of gay men, lesbians, and bisexuals. The mere fact that a group can be identified, however, does not mean that the group constitutes a suspect class that receives heightened scrutiny under the Equal Protection Clause. *See, e.g.*, *Heller v. Doe*, No. 92-351, 1993 WL 218271, at *5 (U.S. June 24, 1993) (recognizing that the Supreme Court has declined to apply heightened scrutiny to the identifiable groups of the mentally ill or the mentally retarded); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (declining to apply heightened scrutiny to the identifiable group of elderly individuals).

In fact, courts have consistently rejected claims that the identifiable group of homosexuals constitutes a suspect class. *See, e.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (concluding that homosexuals are neither a suspect or quasi-suspect class); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same), *cert. denied sub nom. Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (same); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) (same), *aff'd*, 470 U.S. 903 (1985); *Steffan v. Cheney*, 780 F. Supp. 1, 10 (D.D.C. 1991) (same).

For example, *Padula* rejected the claim that homosexuals constitute a suspect class by stating that "[i]f the Court [in *Bowers v. Hardwick*, 478 U.S. 186 (1986)] was unwilling to object to state laws that criminalized the behavior that defines the class, it is hardly open to a lower court to conclude

argument on an alleged infringement of the fundamental right to participate equally in the political process. The appellees claimed that if the district court concluded that Amendment 2 impinged on either the First or the Fourteenth Amendment, a strict scrutiny standard of review should apply under which the State would have the burden of establishing a compelling state interest.[4]

After conducting a four-day hearing and without making any findings of fact, the district court granted the preliminary injunction. In rendering its decision, the district court agreed that the strict scrutiny standard of review applied to Amendment 2. However, the district court did not rely upon either the First Amendment argument advanced by the appellees or address the fundamental right asserted by the appellees in their motion for the preliminary injunction. Instead, the district court held that Amendment 2 must satisfy the strict scrutiny standard of review based on a fundamental right not to have the State endorse and give effect to private biases.[5] Pending

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that state- sponsored discrimination against the class is invidious [because] there can hardly be a more palpable discrimination against a class than making the conduct that defines the class criminal." *Padula*, 822 F.2d at 103. A number of states continue to classify the conduct that defines the class as criminal behavior. *See, e.g.*, Ala. Code § 13A-6-65(a)(3) (1975); Ark. Code Ann. § 5-14-122 (Michie 1987); Ga. Code Ann. § 16-6-2 (1992); Kan. Stat. Ann. § 21-3505 (1988 & 1992 Supp.); Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1990); Md. Code Ann. Crimes and Punishment 554 (1954); Mich. Stat. Ann. § 28.355 (Callaghan 1990); Minn. Stat. § 609.293 (1992); N.Y. Penal Law § 130.38 (McKinney 1987); Okla. Stat. Ann. tit. 21, § 886 (West 1983 & 1993 Supp.); S.D. Codified Laws Ann. § 22-22-2 (1988 & 1993 Supp.).

[4]The appellees alternatively asserted that the burdens Amendment 2 imposed on gay men, lesbians, and bisexuals lacked a rational basis.

[5]The appellees assert on appeal that "read in light of the arguments actually presented to the district court, th[e district court's] holding is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation." As the majority recognizes, this assertion is meritless. *See* maj. op. at 8. The district court's order simply does not address the fundamental rights argument advanced by the appellees or their First Amendment claim.

resolution of this appeal, trial has been set in October 1993, to determine whether a permanent injunction should be issued.

II

Although this case presents a number of legal questions, it is not necessary or appropriate for this court to determine all of the issues raised before the district court. The sole issue before us on this appeal is the validity of the preliminary injunction issued by the district court. As such, the logical starting point is the district court's order and the reasons for the entry of the preliminary injunction. Neither the majority nor the appellees defend the underlying premise of the district court's order which identified a new fundamental right as the basis for applying the strict scrutiny standard of review. The explanation is simple--the district court erred in issuing a preliminary injunction based on a fundamental right not to have the State endorse and give effect to private biases. Before addressing the district court's order, however, it is necessary to outline the appropriate standard of review on appeal for the issuance of a preliminary injunction.

A

It is well settled that an appellate court must reverse the granting of a preliminary injunction if the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Shango v. Jurich*, 681 F.2d 1091, 1096 (7th Cir. 1982); *e.g.*, *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982). In *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), we delineated the standard for a trial court to apply in ruling on a preliminary injunction motion. Before a trial court may issue a preliminary injunction under *Rathke*, "the moving party must establish, as a threshold requirement, a clear showing that injunctive relief is necessary to protect existing . . . fundamental constitutional rights." *Id.* at 653. Accordingly, to determine whether the threshold requirement of *Rathke* is satisfied, a trial court must analyze whether the United States Supreme Court has recognized the fundamental right at issue. *Id.*; *cf. Dronenburg v. Zech*, 741 F.2d 1388, 1396 n.5 (D.C. Cir. 1984) (stating that "the only question open to [a lower

court is] whether the Supreme Court has created a right, which, fairly defined, covers the case before [it] or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case [it] must now decide").

The issuance of a preliminary injunction by a trial court must also be guided by sound legal principles. *See Shango*, 681 F.2d at 1096; *Charles v. Carey*, 627 F.2d 772, 776 (7th Cir. 1980). When a preliminary injunction is based on an erroneous legal premise, the underlying premise is subject to de novo review by an appellate court, which can determine whether the premise is erroneous. *See Shango*, 681 F.2d at 1096; *Buffalo Courier-Express, Inc. v. Buffalo Evening News*, 601 F.2d 48, 59 (2d Cir. 1979); *Douglas v. Beneficial Fin. Co.*, 469 F.2d 453, 454 (9th Cir. 1972); *Delaware & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 620 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); *Quaker Action Group v. Hickel*, 421 F.2d 1111, 1115 (D.C. Cir. 1969); *accord Bloomer v. Boulder County Bd. of Comm'rs*, 799 P.2d 942, 944 (Colo. 1990). While a determination on appeal that a trial court's underlying legal premise is erroneous does not reflect that the trial court was chargeable with an abuse of discretion, *see Delaware*, 450 F.2d at 620-21, a preliminary injunction predicated on a clear mistake of law may nevertheless require reversal. *Shango*, 681 F.2d at 1096; *Charles*, 627 F.2d at 776; *Delaware*, 450 F.2d at 623.

Based on the foregoing principles, it is appropriate to apply a de novo standard of review in this case to evaluate the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases. A review of Supreme Court jurisprudence concerning fundamental rights is therefore necessary to determine whether the premise relied upon by the district court is erroneous.[6]

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[6]Our review in this case is limited to the United States Constitution. *See supra* note 2 and accompanying text. Accordingly, we are required to follow the pronouncements of the Supreme Court. *People v. Cisneros*, No. 91SC467, 1993 WL 242337, at *9 (Colo. July 6, 1993) (Erickson, J., concurring) (stating that state courts are bound by Supreme Court precedent interpreting the federal Constitution and cannot impose greater limitations or afford more protections under the federal Constitution than the Supreme Court has in its decisions); *cf. Lockhart v. Fretwell*, 113 S. Ct. 838, 846

B

Under traditional equal protection analysis, legislation that involves a suspect classification *or* affects a fundamental right is subject to the strict scrutiny standard of review. *Heller v. Doe*, No. 92-351, 1993 WL 218271, at *5 (U.S June 24, 1993); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *see generally* 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law Substance and Procedure* 18.3, at 12-28 (2d ed. 1992 & 1993 Supp.) [hereinafter *Treatise on Constitutional Law*]. If the government cannot show a compelling state interest, legislation that involves a suspect classification or affects a fundamental right will be declared unconstitutional. *See Heller*, 1993 WL 218271, at *5; *Cleburne*, 473 U.S. at 440.

Justice Stone's discussion of "discrete and insular minorities" in his renowned footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), explains the rationale for subjecting legislation involving a suspect classification to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *e.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971).[7] Since that time, the Supreme Court has held, without exception, that the strict scrutiny standard of review applies to legislation or state

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(1993) (Thomas, J., concurring) (stating that under the structure of our national system, a state court decision interpreting the federal Constitution is no less authoritative than a lower federal court decision).

[7]Justice Stone explained in footnote 4:

> [W]e need [not] enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Products, 304 U.S. at 152-53 n.4 (citations omitted).

constitutional amendments based on traditionally suspect classifications. *See, e.g., Graham,* 403 U.S. at 372 (alienage); *Loving v. Virginia,* 388 U.S. 1, 11 (1967) (race); *Korematsu v. United States,* 323 U.S. 214, 215 (1944) (national origin).[8]

Similarly, the Supreme Court has held repeatedly that the strict scrutiny standard of review applies to legislation that affects a "fundamental" constitutional right. The identification of a right as a fundamental right is a substantive decision unrelated to equal protection or the technical standards of review. *See* 3 *Treatise on Constitutional Law* § 18.3, at 18; *see generally* 2 *Treatise on Constitutional Law* § 15.7, at 427-37. The decision of whether a right is fundamental involves a judicial determination that the text or structure of the federal Constitution evidences a value that should be taken from the control of the political branches of government and is best characterized as a substantive due process decision. *See* 3 *Treatise on Constitutional Law* 18.3, at 18 n.19; *Bowers v. Hardwick,* 478 U.S. 186, 197 (1986) (Powell, J., concurring); *see also San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 33-34 (1973) (suggesting that fundamental rights must be explicitly or implicitly guaranteed by the United States Constitution).

For example, the decision of the Supreme Court to find the right to vote to be a constitutionally protected fundamental right that is subject to the strict scrutiny standard of review was a substantive due process determination based on an analysis of the importance of the right to vote and the provisions of the Constitution. *See* 3 *Treatise on Constitutional Law* 18.31, at 766. The Supreme Court has employed similar analysis to recognize the fundamental rights of interstate travel, *Shapiro v. Thompson,* 394 U.S. 618 (1969), privacy, *Griswold v. Connecticut,* 381 U.S. 479, 484 (1965), and most of the provisions set forth in the Bill of Rights. *See, e.g., Police Dep't of Chicago v. Mosley,* 408 U.S. 92 (1972) (using equal protection

[8]In this case, the appellees did not assert before the district court or on appeal that Amendment 2 should be evaluated under the strict scrutiny standard of review based on suspect class analysis. *See also supra* note 3 (listing courts that have rejected argument that homosexuals constitute a suspect class).

analysis to strike down a law that infringed upon fundamental rights within the First Amendment).[9]

For the most part, however, the Supreme Court has refused to expand the list of fundamental constitutional rights. The number of

[9]Under the Due Process Clause of the Fourteenth Amendment, most of the provisions of the Bill of Rights have been applied to the states because the Supreme Court has found them to be "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319 (1937), or "fundamental to the American scheme of justice." *Duncan v. Louisiana,* 391 U.S. 145, 148-49, *reh'g denied,* 392 U.S. 947 (1968). Today, virtually all of the provisions of the Bill of Rights have been incorporated into the Fourteenth Amendment. *E.g., Benton v. Maryland,* 395 U.S. 784 (1969) (incorporating Fifth Amendment protection against double jeopardy); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (incorporating Sixth Amendment right to counsel in criminal prosecution); *Mapp v. Ohio,* 367 U.S. 643 (1961) (incorporating Fourth Amendment regulation against unreasonable search and seizures); *Gitlow v. New York,* 268 U.S. 652 (1925) (incorporating First Amendment free speech protection); *but see Hurtado v. California,* 110 U.S. 516 (1884) (refusing to incorporate grand jury indictment guarantee of the Fifth Amendment).

The rights that have been held applicable to the states through the Fourteenth Amendment are also considered fundamental rights for purposes of equal protection analysis. *See* 3 *Treatise on Constitutional Law* § 18.39, at 490. As Professors Nowak and Rotunda explain:

> [L]aws which classify persons in terms of their abilities to exercise rights which have specific recognition in the first eight amendments do not generally arise as equal protection issues. In these instances the denial of the right to one class of persons is likely to be held a violation of the specific guarantee without any need to resort to equal protection analysis. Thus, if the state or federal government were to deny to a specific class of persons the right to bail upon certain criminal charges, the classification should be analyzed to determine the compatibility of the law with the substantive guarantees of the eighth amendment prohibition of excessive bail, although it could just as easily be analyzed as an equal protection issue.

Id. at 490-91.

rights that the Supreme Court has found to be fundamental, and therefore worthy of strict judicial scrutiny, is quite limited. Among others, the Supreme Court has refused to declare education, housing, welfare payments, or government employment to be of fundamental constitutional value. *See* 3 *Treatise on Constitutional Law* § 18.42, at 821-31.

Bowers v. Hardwick, 478 U.S. 186 (1986), in which the Supreme Court rejected the assertion that the federal Constitution conferred a fundamental right on homosexuals to engage in sodomy, is instructive of the type of analysis used by the High Court to address the substantive due process question of whether a fundamental right exists. In answering the substantive due process question, Justice White reviewed prior cases addressing fundamental rights:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503 (Powell, J.). *See also Griswold v. Connecticut*, 381 U.S., at 506.
>
> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.

Bowers, 478 U.S. at 191-92; *see generally* John E. Nowak, *The "Sixty-Something" Anniversary of the Bill of Rights*, 1992 U. Ill. L. Rev. 445, 462-76 (reviewing different methods of constitutional interpretation).

Having concluded that a fundamental right to engage in homosexual sodomy did not exist, Justice White emphasized that the case also "call[ed] for some judgment about the limits of the Court's role in carrying out its constitutional mandate," *Bowers*, 478 U.S. at 190, and stated:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. *There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.* Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Id. at 194-95 (emphasis added). Given the express reluctance of the Supreme Court to recognize "new" fundamental rights, I address the district court's order.

C

In this case, the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases provided the basis for issuing the preliminary injunction. However, a review of the Supreme Court precedent cited by the district court to justify the issuance of the preliminary injunction leads me to conclude that the Supreme Court has not recognized the fundamental right identified by the district court.

In support of its recognition of a new fundamental right, the district court cited language from *Reitman v. Mulkey*, 387 U.S. 369 (1967), and *Palmore v. Sidoti*, 466 U.S. 429 (1984). The district court also referred to *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991) to bolster its reasoning. Properly analyzed, these cases do not support judicial recognition of a fundamental right not to have the State endorse and give effect to private biases, but rather indicate that the district court extrapolated a fundamental right from the language appearing in the various decisions.

In *Reitman*, the Supreme Court reviewed a voter-initiated state constitutional amendment which the California Supreme Court concluded was intended to encourage and authorize racial discrimination. *Reitman*, 387 U.S. at 376. The California Supreme Court found that the intent of the constitutional amendment was to create a constitutional right to discriminate on racial grounds and therefore dealt with the amendment as though it expressly authorized and constitutionalized the private right to discriminate against racial minorities. *Id.* The Supreme Court accepted the findings of the California court and concluded that "there was no sound reason [to] reject [its] judgment" that the amendment involved racial discrimination in violation of the Fourteenth Amendment. *Id.*

Language subsequently appeared in *Reitman* which was seized on by the district court in support of the recognition of a fundamental right of any identifiable group not to have the state endorse and give effect to private biases. *Reitman* stated:

> The right to discriminate, including the right to discriminate on *racial grounds*, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing *racial discriminations* need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

Id. at 377 (emphasis added). Based on this language from *Reitman*, the district court characterized the analysis of the Supreme Court as involving a fundamental right. The district court's conclusion is erroneous insofar as *Reitman*'s equal protection analysis focused

solely on the racial classification drawn by the constitutional amendment and represents traditional suspect classification analysis. As such, no court or commentator has ever viewed *Reitman*, either alone or in combination with other cases, as having applied fundamental right analysis.

In *Palmore*, the Supreme Court invalidated a child custody order that had been based solely on a judicial determination that it would be harmful to a child to remain in a racially mixed household. *Palmore*, 466 U.S. at 431. *Palmore* struck down the lower court's custody order because it represented invidious racial prejudice. In doing so, *Palmore* explicitly stressed the importance of the racial classification and accordingly concluded that the strict scrutiny standard of review applied. *Id.* at 432-33 (stating that "classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny").

Palmore also stated "the Constitution cannot control such prejudices but neither can it tolerate them . . . private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 433. Despite this language, which was cited by the district court in this case, the fact remains that *Palmore* was based on traditional suspect classification analysis and not a fundamental right not to have the State endorse and give effect to private biases. Like *Reitman*, no court or commentator has ever viewed *Palmore*, either alone or in combination with other cases, as having applied fundamental right analysis.

The district court further found that the citation to *Palmore* in *City of Cleburne* was significant. *City of Cleburne*, however, did not apply the strict scrutiny standard of review and stands only for the proposition that irrational biases cannot, in and of themselves, qualify as a legitimate governmental interest to satisfy rational basis review. The district court also mentioned *Pruitt*, a Ninth Circuit case involving discrimination against homosexuals in the military, because it also cited to *Palmore*. *Pruitt*, however, like *City of Cleburne*, did not apply the strict scrutiny standard of review. As such, neither case can be read as applying fundamental rights analysis.

The cases relied on by the district court as recognizing a fundamental right not to have the State endorse and give effect to

private biases do not apply fundamental rights analysis, but rather involve traditionally suspect classifications or the application of rational basis review. Accordingly, I conclude that the district court's issuance of the preliminary injunction in this case was based on the application of an erroneous legal premise that has never been recognized by the Supreme Court.

III

I am also compelled to address the "fundamental right to participate equally in the political process" because the majority, applying de novo review to the district court's legal conclusion, upholds the granting of the preliminary junction based on its recognition of, and reliance on, a different fundamental right than that identified by the district court.[10] In my view, the majority's underlying legal premise that Supreme Court precedent has recognized such a fundamental right is also erroneous and provides no support for the conclusion that the strict scrutiny standard of review applies in this case.

The majority's extensive review of prior Supreme Court decisions indicates that language discussing citizen participation has appeared in a variety of contexts in numerous equal protection opinions. The traditional reading of these cases, however, suggests that the majority's analysis suffers from the same flaw as the district court's analysis--at no point has the Supreme Court explicitly identified the fundamental right that the majority extrapolates from the Supreme Court decisions on which it relies.

Appropriately categorized, there is no more of a common thread uniting the decisions cited by the majority than there is a common thread of logic or precedent to support the district court's analysis.[11] In my view, the cases cited by the majority all fall within Supreme Court decisions that address either the fundamental right to vote or ballot access, or opinions that involve suspect classifications. Based on a review of each of these three categories, I conclude that the majority's underlying legal premise that the Supreme Court has recognized a fundamental right to participate equally in the political process is erroneous.

A

In a long series of cases beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court has held that there is a

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[10]I note that in reviewing a preliminary injunction that has been granted by a trial court, we are not *required* to analyze the alternative grounds raised by the parties before the trial court, but not ruled on, or to discuss grounds not raised below by the parties. Based on the limited grounds on which this case is before us, we need not analyze the assertion of the appellees that a preliminary injunction could have been properly issued based on a fundamental right to participate equally in the political process any more than we need address the original assertions of the appellees that Amendment 2 violated their (1) fundamental right to freedom of expression; (2) fundamental right to petition the government for redress of grievances; or (3) fundamental right to vote. Recognizing this fact, the appellees assert on appeal that the district court's ruling is best construed as holding that Amendment 2 infringes upon the fundamental right of political participation. *See supra* note 5.

Because the district court's ruling cannot be so construed, the majority justifies upholding the injunction on a different legal basis than that relied on by the district court by citing to *Farmers Group, Inc. v. Williams*, 805 P.2d 419, 428 (Colo. 1991). Neither the majority nor the appellees cite to any case where an appellate court has upheld a preliminary injunction based on different legal grounds than those articulated and relied on by the trial court. However, I agree that if a trial court erred in applying the applicable law, an appellate court, pursuant to its ability to review the underlying legal premises de novo, may apply the correct legal standard and uphold the injunction if supported by the record. *See Rowland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 385 (7th Cir. 1984) (stating that any purely legal determination made by a trial judge in granting or denying a preliminary injunction is subject to plenary appellate review).

[11]The majority's suggestion that a fundamental right to participate equally in the political process encompasses a wide variety of Supreme Court equal protection opinions in many ways is akin to the district court's delineation of the fundamental right it identified based on language drawn from other equal protection decisions.

fundamental right to have one's vote counted equally. *See* 2 *Treatise on Constitutional Law* 15.7, at 435; *e.g.*, *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).[12] Traditionally, both commentators and case book authors have characterized these decisions as recognizing a fundamental "right to vote" that is subject to the strict scrutiny standard of review. *See, e.g.*, John E. Nowak et al., *Constitutional Law*, ch. 16, I at 765-76 (2d ed. 1983); 3 *Treatise on Constitutional Law* 18.31, at 388-409; Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. 121, 150 (1989); James A. Kushner, *Substantive Equal Protection: The Rehnquist Court and the Fourth Tier of Judicial Review*, 53 Mo. L. Rev. 423, 429-33 (1988); David M. Treinman, *Equal Protection and Fundamental Rights--A Judicial Shell Game*, 15 Tulsa L.J. 183, 195-202 (1980); *see generally* Gerald Gunther, *Constitutional Law* 787-823 (11th ed. 1985); William B. Lockhart et al., *Constitutional Law: Cases-Comments-Questions* 1316-56 (6th ed. 1986); Ronald D. Rotunda, *Modern Constitutional Law* 598-613 (3d ed. 1989).

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[12]The right to vote undoubtedly includes the right to participate in the *electoral* process by exercising the franchise. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("this Court has made clear that a citizen has a constitutionally protected *right to participate in elections* on an equal basis"); 2 *Treatise on Constitutional Law* § 15.7, at 435; *cf.* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument*, 41 Fla. L. Rev. 443, 459 n.63 (1989) (characterizing the "right to participate in *elections* on an equal basis" as a fundamental right).

Neither the appellees nor the majority, however, contends that the right to participate in the *electoral* process is equivalent to the much more expansive right to participate in the *political* process. *See generally* Laurence H. Tribe, *American Constitutional Law* § 13-1, at 1062 (2d ed. 1988) (characterizing political participation rights as "rights poised between procedural due process and the freedoms of expression and association"). Nor does the majority assert that in this case Amendment 2 infringed on the appellees' fundamental right to vote.

Notably, in their general discussion of fundamental rights in their brief before the district court, the appellees mentioned only the fundamental right to vote (including the right to participate in the electoral process) and not the more expansive fundamental right upon which they sought the injunction. The appellees stated:

"The two branches of equal protection law are distinct. Rights considered 'fundamental' for equal protection purposes include the right to interstate travel (burdened by residency requirements); *the right to electoral participation, including the right to vote* (burdened by various qualifications and obstacles); the right of access to the courts (burdened by fees); and the right of privacy (burdened by laws affecting rights to procreation and family)."

By doing so, the appellees appear to concede that the fundamental right to participate in the political process has yet to be identified by the Supreme Court.

The majority recognizes that the decisions it cites involving reapportionment or direct restrictions on the exercise of the franchise are readily distinguishable from the present case. The reason that these cases are distinguishable is because they all involve the well-settled fundamental right to vote. *See, e.g., Kramer*, 395 U.S. at 627 ("if a challenged state statute grants the *right to vote* to some bona fide residents . . . and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest"); *Harper*, 383 U.S. at 667 ("the political franchise of *voting [is] a fundamental political right*"); *Reynolds*, 377 U.S. at 562 ("the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the *right of citizens to vote* must be carefully and meticulously scrutinized"); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("even the most basic [rights] are illusory if the *right to vote* is undermined").

As such, an extended analysis of these cases is not necessary to reach the conclusion that the Supreme Court decisions cited by the majority involving reapportionment or direct restrictions on the exercise of the franchise all fall within the jurisprudence addressing the fundamental right to vote and not within a broader-based fundamental right to participate equally in the political process. My conclusion is not only supported by the language quoted above, but also represents the traditional view of constitutional commentators and case book authors. *See* Nowak et al., *Constitutional Law*, at 765-76; 3 *Treatise on Constitutional Law* 18.31, at 388-409; *e.g.*, Gunther, *Constitutional Law*, at 787-823; Lockhart et al., *Constitutional Law*, at 1316-56; Rotunda, *Modern Constitutional Law*, at 598-613;

Galloway, *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. at 150-52; Kushner, *Substantive Equal Protection*, 53 Mo. L. Rev. at 429-33; Treinman, *Equal Protection and Fundamental Rights--A Judicial Shell Game*, 15 Tulsa L.J. at 195-202.

The fact that the appellees initially claimed before the district court that Amendment 2 would infringe upon the fundamental right to vote, in addition to asserting that Amendment 2 would infringe upon the fundamental right to participate equally in the political process, further buttresses this conclusion. *See also supra* note 12 (recognizing the implicit acknowledgement of the appellees that the fundamental right to participate equally in the political process has not been identified as a fundamental right).

B

In addition to recognizing that any infringement on the fundamental right to vote is subject to the strict scrutiny standard of review under the Equal Protection Clause, the Supreme Court has concluded in a separate line of decisions that regulations involving ballot access may implicate the Equal Protection Clause. The Constitution does not contain any express provision that guarantees individuals the right to become a candidate, and the Supreme Court has never recognized a fundamental right of candidates to be listed on ballots. Nevertheless, the ballot access decisions indicate that heightened, although not strict, judicial scrutiny is required based on a combination of the fundamental right to vote and the First Amendment right of association. *See* 3 *Treatise on Constitutional Law* 18.32, at 411; Galloway, *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. at 152; *e.g.*, *Burdick v. Takushi*, 112 S. Ct. 2059 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Admittedly, the Supreme Court has minimized the extent to which voting rights cases are distinguishable from ballot access cases, *Burdick*, 112 S. Ct. at 2065-66, and the early decisions within this category employed the strict scrutiny standard of review. *See Williams*, 393 U.S. at 30. Notably, however, the Supreme Court's more recent cases clearly indicate that the strict scrutiny standard of review does not apply to ballot access cases. *See Burdick*, 112 S. Ct.

at 2060 (involving the open use of a balancing test); *Anderson*, 460 U.S. at 780 (same).

In *Burdick*, for example, the petitioner characterized the case as a right to vote case rather than as a ballot access case in an attempt to convince the Supreme Court that the strict scrutiny standard of review applied. *Burdick*, 112 S. Ct. at 2065. While recognizing the two different categories of case law, *Burdick* rejected the characterization of the case offered by the petitioner and specifically found that the strict scrutiny standard of review did not apply. *Id.* at 2066. Instead, *Burdick* applied the balancing test that the Supreme Court adopted in *Anderson*.

The decisions cited by the majority falling within the ballot-access category of cases address entirely distinct questions and constitutional problems from the present case and do not apply the strict scrutiny standard of review. As such, any unifying principle linking these cases with decisions from other equal protection categories, is, in my view, attenuated.

C

After citing language from particular equal protection decisions in the ballot access and right to vote contexts, the majority addresses the limited category of cases on which it principally relies as establishing explicit support for the recognition of a fundamental right to participate equally in the political process. *See* maj. op. at 20-28. According to the majority, the equal protection doctrine delineated in *Hunter v. Erickson*, 393 U.S. 385 (1969), and subsequently addressed in *James v. Valtierra*, 402 U.S. 137 (1971), *Gordon v. Lance*, 403 U.S. 1 (1971), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), supports its conclusion that the Supreme Court has recognized a fundamental right to participate equally in the political process.

In my view, a careful reading of these four cases highlights the fact that they are not fundamental rights cases at all, but instead address potential violations of the Equal Protection Clause based on traditionally suspect classifications, albeit in situations where the ordinary political process has been restructured. *See Citizens for*

Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 1991) (stating that "*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"); *cf.* Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 314 (1991) (stating that "[i]n the place of political process theory, the Justices have inserted a very different notion of equal protection--that racial classifications are presumptively unconstitutional because race almost invariably *should be* irrelevant to governmental decisionmaking"); Robert H. Beinfield, Note, *The Hunter Doctrine: An Equal Protection Theory that Threatens Democracy*, 38 Vand. L. Rev. 397, 405 (1985) (concluding that racial classifications provided the basis for the heightened level of judicial scrutiny in *Hunter*).

In *Hunter*, the Supreme Court addressed a city charter amendment repealing a racial anti-discrimination ordinance and requiring voter approval before such an ordinance could be enacted. *Hunter*, 393 U.S. at 387. The Supreme Court initially concluded that it "need not rest on *Reitman* to decide" the case before it because "unlike *Reitman*, there was an explicitly racial classification [in *Hunter*]." *Id.* at 389.[13] Nevertheless, *Hunter* characterized the amendment as placing "special burdens on *racial minorities* within the governmental process," *id.* at 391 (emphasis added), and stated:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on *race, racial classifications are 'constitutionally suspect,'* and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications."

Id. at 391-92 (citations omitted) (emphasis added).[14]

Two years later, in *James*, 402 U.S. at 137, the Supreme Court was asked to apply *Hunter* in a case concerning the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low-income housing projects until voters approved the project in a referendum. The federal district court relied on *Hunter* to find that the constitutional measure violated the Equal Protection Clause.

Under the broad reading of *Hunter* dictated by the majority, the federal district court's result should have been affirmed because the measure "involve[d] legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters (*i.e.* poor people who would qualify for low-rent housing)." Maj. op. at 18. In its attempt to place boundaries on the expansive fundamental right that it recognizes, limiting language requiring "the presence of an *independently identifiable group* of voters" appears throughout the majority's analysis. *See* maj. op. at 14, 26, 27, 29, 31, 32, 35.[15] For

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[13]*Hunter* did not state that it could not rely on *Reitman* which was decided the previous term, but rather suggested that it did not have to rely on *Reitman* to declare the statute unconstitutional. This conclusion is not surprising given that the cases involved completely different factual settings--one statute that embodied an explicitly racial classification (*Hunter*) and one that did not (*Reitman*).

Amici curiae in this case correctly point out that while *Reitman* plainly involved political participation issues, the Court analyzed it solely as a race case. It is somewhat difficult to explain why the Supreme Court would have relied exclusively on suspect classification grounds in *Reitman* when it could have struck down the statute based on the fundamental right that is today identified and embraced by the majority. In my view, the most logical explanation is that the Supreme Court simply did not recognize such a broad-based fundamental right. This explanation also accounts for the conspicuously superficial treatment that *Reitman* receives in the majority opinion.

[14]Subsequent federal cases addressing *Hunter* characterized the opinion as involving an unconstitutional racial classification. *See, e.g., Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975); *Lee v. Nyquist*, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

[15]The basis for the limiting language seized upon by the majority is the Supreme Court's statement in *Gordon* that in contrast to *Hunter*, it could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing." *Gordon*, 403 U.S. at 5. While the statement was certainly true in *Gordon*, it was also irrelevant to the equal

example, the majority concludes that just as *Hunter* fenced out an independently identifiable group, so too does Amendment 2 expressly fence out the identifiable group of gay men, lesbians, and bisexuals. Maj. op. at 35.

Under the majority's analysis, the strict scrutiny standard of review therefore should have applied in *James* based on the fundamental right to participate equally in the political process, because *James* involved a group (poor people who would qualify for low-rent housing) that "was 'independently identifiable' apart from the group created by the statute itself." Maj. op. at 27. Just as "[t]he class singled out in *Hunter* was clear--'those who would benefit from laws barring racial, religious, or ancestral discriminations,'" *Gordon*, 403 U.S. at 5, the class singled out in *James* is equally clear--those who would benefit from local agency decisions providing for low-rent housing projects.[16]

Despite these considerations, the Supreme Court did not apply the strict scrutiny standard of review. *James*, 402 U.S. at 143. Instead, *James* found that the strict scrutiny standard of review applied in *Hunter* not because a fundamental right existed and was infringed

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protection analysis, as is evidenced by the fact that such language did not appear in *Hunter*, *James*, or *Washington*.

It is interesting, however, that the district court in this case also attempted to restrict the boundaries of the fundamental right not to have the state endorse and give effect to private biases by employing the same language.

[16]Similarly, just as Amendment 2 precludes gay men, lesbians, and bisexuals from "seeking governmental action favorable" to them, maj. op. at 36, and from enjoying the benefit of local provisions, so too did *James* preclude poor people who would benefit from low-rent housing from seeking governmental action favorable to them and from enjoying the benefit of previously adopted local agency decisions providing low-rent housing projects. Moreover, the constitutional measure adopted in *James* precluded poor people who would benefit from low-rent housing from employing the "normal political institutions and processes," maj. op. at 20, to seek low-rent housing projects by requiring the project to be approved by a majority of those voting at a community election. *James*, 392 U.S. at 138-39.

upon, but because the city charter amendment at issue in *Hunter* affected a traditionally suspect class:

> Unlike the case before us, *Hunter* rested on the conclusion that Akron's referendum law denied equal protection by placing "*special burdens on racial minorities* within the governmental process." . . . Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . The present case could be affirmed only by extending *Hunter*, and this we decline to do.

Id. at 140-41 (emphasis added). In this sense, I agree with the majority that *James* is "best understood" as a case where strict scrutiny analysis *did not apply* because the identifiable group challenging the constitutional measure was not recognized as a suspect classification, maj. op. at 28 n.21, and find *James* to be dispositive of the case before us.[17]

In explaining why the constitutional amendment at issue before it did not violate the Equal Protection Clause, however, *James* also cogently explained why *Hunter*, like *Reitman* before it, is "best

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[17]Justice Marshall, joined by Justices Brennan and Blackmun, dissented in *James* on the basis that a suspect classification was involved. Justice Marshall concluded that the constitutional provision at issue was "an explicit classification on the basis of poverty--a suspect classification which demands exacting judicial scrutiny, see *McDonald v. Board of Election*, 394 U.S. 802, 807 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Douglas v. California, supra.*" *James*, 402 U.S. at 144-45. Justice Marshall's view has never been adopted by the Supreme Court.

In determining whether a group is a suspect or quasi-suspect class, the Supreme Court has identified several criteria to be used. *San Antonio Indep. School Dist.*, 411 U.S. at 1; *see also supra* note 7 (discussing the origin of "discrete and insular minorities" language in footnote 4 of *Carolene Products*). Among others, the Supreme Court has indicated that the immutability of a group's identifying trait should be considered. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *cf. Woodward*, 871 F.2d at 1076 (noting that "homosexuality, as a definitive trait, differs fundamentally from those defining recognized suspect or quasi-suspect classes").

understood" as a case where the strict scrutiny standard of review *did apply* because a traditionally suspect classification was involved. Before the Supreme Court, the appellees in *James* asserted that the mandatory referendum required by the constitutional amendment "hamper[ed] persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." *James*, 402 U.S. at 142. In this way, an identifiable group was fenced out from the normal political processes. Nevertheless, the Supreme Court specifically rejected the assertion of the appellees that such a restructuring of the political process violated the Equal Protection Clause:

> [O]f course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

Id. In my view, the rejection of the assertion of the appellees in *James* weakens, and all but forecloses, the broad reading of *Hunter* offered by the majority.

Less than two months after *James*, the Supreme Court in *Gordon*, 403 U.S. at 1, again distinguished *Hunter* by indicating that the reason the strict scrutiny standard of review was required in *Hunter* was because a traditionally suspect classification was involved. *Gordon* also involved a challenge by a group of interested citizens to a state's constitutional and statutory provisions, which in that case required a sixty-percent approval for any bonded indebtedness incurred by political subdivisions of the state. *Id.* at 2-3.

In rejecting the equal protection claim, *Gordon* stated:

> Unlike the restrictions in our previous cases, the West Virginia Constitution singles out *no "discrete and insular*

> *minority"* for special treatment. . . . We are not, therefore, presented with a case like *Hunter v. Erickson*, 393 U.S. 385 (1969), in which fair housing legislation alone was subject to an automatic referendum requirement. The class singled out in *Hunter* was clear--"those who would benefit from laws barring *racial, religious, or ancestral discriminations.*"

Id. at 5 (emphasis added). As in *James*, the strict scrutiny standard of review did not apply in *Gordon* because the group challenging the constitutional measure could not establish membership in a discrete and insular minority that the Supreme Court recognized as a suspect classification. In this sense, *Gordon* is also "best understood" as a case where strict scrutiny analysis did not apply because a suspect classification was not involved.[18]

In *Washington*, 458 U.S. at 457, the Supreme Court for the first time struck down a statewide initiative based on *Hunter*. Because the initiative was drafted to terminate the use of mandatory busing to achieve racial integration in the Washington public school system, the Supreme Court found that it violated the Equal Protection Clause:

> [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," thereby "making it *more* difficult for certain racial and religious minorities

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[18]The fact that *Gordon* could not discern any "independently identifiable group or category that favors bonded indebtedness over other forms of financing," while certainly true did not impact on the equal protection analysis. In *James*, where an identifiable group favoring low-income housing clearly existed, the Supreme Court nevertheless declined to apply strict scrutiny analysis because no traditionally suspect classification was involved. *See supra* note 17 and accompanying text.

than for other members of the community to achieve legislation that is in their interest."

Id. at 470 (citations omitted).

That *Washington*'s analysis was driven by the traditionally suspect classification involved in the case is further suggested by its reaffirmation of the principle of *Hunter* that meaningful and unjustified distinctions based on race are impermissible:

> When the political process or the decisionmaking mechanism used to *address* racially conscious legislation--and only such legislation--is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'" *James v. Valtierra*, 402 U.S., at 141, quoting *Hunter v. Erickson*, 393 U.S., at 391.

Id. at 485-86.[19]

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[19]My conclusion is further supported by *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), a Supreme Court opinion announced the same day as *Washington* that involved a similar attempt by state voters to restrain busing plans. In *Crawford*, however, the Supreme Court upheld a state constitutional amendment providing that state courts could not order mandatory student assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause. *Id.* at 529.

The petitioners asserted that the constitutional amendment fell within *Hunter* because it employed an "explicit racial classification" and imposed a "race-specific burden on minorities." *Id.* at 536. *Crawford* agreed that if the constitutional amendment employed a racial classification, the strict scrutiny standard of review would apply, but found *Hunter* inapplicable to the case before it because the amendment did "not embody a racial classification." *Id.* at 536-37. In this way, the constitutional amendment in *Crawford* differed from the amendment in *Washington* which embodied an explicit racial classification by reallocating decisionmaking authority in such a way as to make it more difficult for individuals to obtain legislation in their interest because of their race. *See* 3 *Treatise on Constitutional Law* § 18.9(3)(f), at 137; *The Supreme Court 1981 Term*, 96 Harv. L. Rev. 1, 120-30 (1982). The Supreme Court also stressed that having gone beyond

The foregoing review of *Hunter* and its progeny highlights my conclusion that the Supreme Court has never focused on the fundamental right of an independently identifiable group (*i.e.*, poor people who would benefit from low-income housing) to participate equally in the political process. Rather, each of the four cases specifically focuses attention "on the special *burdens on racial minorities* within the governmental process." *See Washington*, 458 U.S. at 458; *Gordon*, 403 U.S. at 5; *James*, 402 U.S. at 141; *Hunter*, 393 U.S. at 391. Because all four decisions were driven by traditional strict scrutiny analysis involving a suspect classification, the fact that the regulations at issue in each occurred within the context of the political process was not dispositive.

D

It is clear that language discussing citizen participation has appeared in a variety of contexts in Supreme Court equal protection opinions addressing the fundamental right to vote, ballot access, and suspect classifications. To date, however, the Supreme Court has never explicitly stated that a fundamental right to participate equally in the political process exists that is subject to the strict scrutiny standard of review. Nor has the Supreme Court found such a fundamental right within the penumbras of the Constitution. Therefore, I cannot agree with the majority's underlying legal premise that the Supreme Court has recognized such a fundamental right to support the strict scrutiny standard of review in this case.[20]

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the requirements of the Fourteenth Amendment, the state was free to return to the standards of the federal Constitution. *Crawford*, 458 U.S. at 542.

[20]The majority's underlying premise that Amendment 2 violates a fundamental right to participate equally in the political process is also difficult to reconcile with the constitutional and statutory provisions of twenty-one states denying individuals convicted of certain crimes, even if the individual is no longer incarcerated, from being elected to, or from holding public office. *See* Steven B. Snyder, *Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons from Holding Elective Office*, 4 J.L. & Pol. 453 app. A (1988) (listing jurisdictions that specifically disqualify ex-felons from holding public office).

In my view, rather than expressing a willingness to extrapolate new fundamental rights based on selective language from prior Supreme Court decisions, we should exercise caution in identifying and embracing previously unrecognized fundamental rights. *See Bowers*, 478 U.S. at 194-95 (stating that "there should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental"); *Dronenburg*, 741 F.2d at 1396 (stating that "[i]f it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so").

At some point in the future, the Supreme Court may agree with the majority's underlying legal premise and identify such an expansive fundamental right to participate equally in the political process. Such a substantive due process decision would most likely conduct an analysis similar to previous Supreme Court decisions and address the importance of the right, relevant Constitutional provisions, the history and traditions of our country, and whether the right is implicit in the concept of ordered liberty. The fact that such analysis is not present in the Supreme Court precedent cited by the majority cautions against the recognition of such a fundamental right.

I am also troubled by the broad reading given to the Supreme Court cases relied upon by the majority because it is contrary to the underlying principles of *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Under *Hass*, a state court cannot impose a restriction as a matter of federal constitutional law that the Supreme Court has specifically refrained from adopting. *Id.* In *James*, the Supreme Court confronted an equal protection challenge by an identifiable group of persons who had been fenced out by the majority's alteration of their access to the political process. Because *James* explicitly refrained from extending *Hunter* to declare a fundamental right to participate equally in the

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It is hard to imagine any greater form of participation in the political process than serving as an elected or appointed public official. Nonetheless, twenty-one states completely deny this aspect of political participation to the independently identifiable group of previously convicted felons. Notably, none of these provisions have been struck down based on an equal protection challenge for infringing on a fundamental right to participate equally in the political process.

political process when it rejected the appellees' assertion in that case, we are constrained by the principles of *Hass* from doing so now. *See People v. Cisneros*, No. 91SC467, 1993 WL 242337, at *9 (Colo. July 6, 1993) (Erickson, J., concurring) (citing *Hass*, 420 U.S. at 719); *see also DiLeo v. Board of Regents*, 590 P.2d 486, 491 (Colo. 1978) (Erickson, J., dissenting) (only the United States Supreme Court can pronounce the final word on whether the strict scrutiny standard of review or the rational basis standard of review applies). Rather, a straightforward application of *James* indicates that the strict scrutiny standard of review does not apply in this case.

IV

In my view, the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases is erroneous. Similarly, the majority's underlying legal premise that the Supreme Court has recognized a fundamental right to participate equally in the political process is erroneous. Because Supreme Court precedent does not support the evaluation of Amendment 2 under the strict scrutiny standard of review, I would reverse and discharge the entry of the preliminary injunction, and remand for trial on the permanent injunction.

APPENDIX E

DISTRICT COURT, COUNTY OF DENVER, STATE OF COLORADO

Case No. 92 CV 7223, Courtroom 19

REPORTER'S TRANSCRIPT

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER as Governor of the State of Colorado and GAIL NORTON as Attorney General of the State of Colorado,

Defendants.

The hearing in this matter commenced on Friday, January 15, 1993, before the HONORABLE H. JEFFREY BAYLESS, Judge of the District Court.

FOR THE PLAINTIFFS:
Ms. Jean E. Dubofsky, Esq.
Ms. Jeanne Winer, Esq.
Ms. Gregory A. Eurich, Esq.
Ms. Darlene M. Ebert, Esq.
Mr. Edward M. Caswall, Esq.
Mr. Joseph N. DeRaismes, Esq.
Mr. David H. Miller, Esq.
Ms. Jane W. Greenfield, Esq.

FOR THE DEFENDANTS: Mr. Timothy M. Tymkovich, Esq.
Mr. John Daniel Dailey, Esq.
Mr. Terrence A. Gillespie, Esq.
Mr. Gregg E. Kay, Esq.
Mr. Mark W. Gerganoff, Esq.
Mr. Jack Wesoky, Esq.

AFTERNOON SESSION, FRIDAY, JANUARY 15, 1993

(The following proceedings were had and entered of record:)

THE COURT: The Court calls 92 CV 7223, Richard Evans, et al, versus Roy Romer, et al.

The record will reflect the appearance of counsel who have been here throughout the week during the presentation of evidence. The matter comes on at this time for the Court to enter its ruling on the two motions for preliminary injunction which have been filed first by the individual plaintiffs in this case and then by the home rule City of Aspen.

The Court is prepared to rule and is going to rule at this time. Before I do that, I want to talk about a couple of things that aren't part of the ruling. Yesterday there was an outburst in the court which the Court felt was inappropriate to the decorum that I want to maintain. And I said so.

Now, in a minute I'm going to rule, and one side is going to perceive that they have won something, and the other side is going to perceive that they have lost something. And that might generate some emotions. And I understand that. As a matter of fact, I suspect there are strong emotions on both sides. And for those who perceive that they have won something, they may want to celebrate. For those who perceive they have lost something, they might want to express disagreement with that, and that's inappropriate in court. I didn't want it yesterday, I don't want it today. But having told everybody what I want, I'm satisfied that this group will abide by the Court's request and maintain the decorum that's appropriate for a courtroom.

Now, the second thing I want to tell you, I decided this about 2:30 this morning. Since that time, with about four hours out to

sleep, I have been writing. And what I've attempted to do is to understand and have my ruling reflect that I know the audience to whom I'm speaking. And I think the audience is made up of two distinct groups. One is a group of legally trained people. That is to say, counsel who have presented this, counsel who have been perhaps inside the bar who may not have presented evidence, and they are familiar with the case law, and they are familiar with the legal concepts, and there will be catch phrases and legal expressions, code I talk in, and they'll understand that. And so a part of it is written for them.

And both sides have told me very fairly, not at this hearing but before, that they anticipate that regardless of what I do, there might be another day and in another higher appellate court that something might be reviewed. So I have written for that audience as well. But I am aware of the interests in this case and the interests in this decision from non-legally trained folks, just the people of Colorado who voted on the Amendment. So what I have attempted to do in writing this is to write at two levels. One for the lawyers and one for the non-lawyers. And I hope not to insult either. And I hope to be clear to both. How well I have succeeded in that will be determined by someone other than me.

Having said those two things, the Court rules as follows: Our form of government is a constitutional democracy, and both of those words have significance. "Constitutional" means our form of government is established by the United States Constitution and by the Colorado Constitution. "Democracy" means what most people think it means, that in most cases the majority rules. Now, let's talk a little bit about that. Historically, the United States Constitution would not have been ratified, if you remember your history classes, unless there had been included the first ten amendments, the Bill of Rights. And the states wouldn't have adopted it without that. So that's how the first ten got there.

Now, in Colorado, for those of you who aren't immediately familiar with our Constitution, it is physically difference in appearance than the United States Constitution. Let me tell you about that. The Bill of Rights to the Colorado Constitution is not a set of amendments. As a matter of fact, the Bill of Rights is right in the body. It is Article II of the Colorado Constitution. Article I is a

one-paragraph geographic description. It says the boundaries of the state start here, and go like this.

The first matter of substance then that is addressed after defining the boundaries is the Bill of Rights in our Constitution. Now, I take that to mean that in Colorado, rights come first. Section 1 of Article II of the Bill of Rights sets out that all political power in Colorado is vested in and derived from people. Section 2 says the people of this state have the sole and exclusive right of governing themselves as free -- as a free, sovereign, and independent state. And to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the Constitution of the United States.

What that says is the majority of citizens can alter the Constitution, it can change. And we have had 29 parts to that Constitution. There are 29 existing articles to Amendment 2 that are the Bill of Rights in Colorado. But in amending that and altering the form of government, even a majority vote of the Colorado citizens cannot violate the constitutional rights of other Colorado citizens.

Now, the issue in question here in this hearing relates to Article II Section 2 of the Colorado Constitution. And it relates to the amendment of that Constitution, the alteration of the State's Constitution by the addition of what was called Amendment 2. Amendment 2 is scheduled actually to become Section 30 of the Bill of Rights here in Colorado. The question raised by the lawsuit asked the court of Colorado whether this amendment violates Article II Section 2 of the Bill of Rights by virtue of being repugnant to the Constitution of the United States. The courts of Colorado are one of the three branches of government under Article III of the Colorado Constitution and are charged with interpreting the Constitution and the laws of the state of Colorado.

Now, the first part of this case is the part we have done this week. And it does not address, and the Court today is not addressing the merits of this case. What will be the final determination will be for another day for full presentation of evidence, full briefing, and full argument. This first part deals with only asking the Court to delay the effective date of the Amendment until such time as that final determination can be made. Such a request is proper, and as a matter of fact, is provided for under the Rules of Civil Procedure,

specifically Rule 65 here in Colorado which allows for preliminary injunctions.

Now, an injunction is a court order which may stop something from happening within a state. This Court is not allowed to base its ruling on a preliminary injunction on its own personal views. Rather, the oath of all Colorado Judges is to support the Constitutions of both United States and of the State of Colorado. And in dealing specifically with preliminary injunctions, the Supreme Court of Colorado has spoken very clearly as to what trial courts are to view in making their decision as to whether injunctions should issue.

I started on Monday, when I introduced this case, by making reference to that case. It's called *Rathke versus MacFarlane*. And if you were here yesterday, you saw that counsel pitched their arguments in terms of the *Rathke versus MacFarlane* standard. That case tells me several things. Let me just brief them. It says, first, that the granting or denial of a preliminary injunction rests in the discretion of the trial court. But then it talks to the trial court as to how it should exercise that discretion. It says these injunctions should not be indiscriminately granted. It says they should only be granted sparingly and cautiously, with the full conviction on the part of the trial court that there is an urgent necessity for the injunction.

Now, the urgent necessity is described by our Colorado Supreme Court as being a threshold. That is to say, if the urgent necessity is not found, the Court doesn't weigh the other six factors. It then says if the threshold, however, is established, then the Court has to weight the six factors that have been discussed. First, that the side seeking the injunction has a reasonable probability of winning the case on the merits.

Now, this calls, admittedly, for some degree of forecast or prediction by the Court as to what may occur in the future. And the Supreme Court recognizes that that's a part of it. Second, it says the Court must consider whether there's a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief. Irreparable injury is defined as injury that cannot be fixed or repaired or adequately compensated perhaps by money.

Third, the Court has to weigh whether or not there is a plain, speedy, and adequate remedy at law, should the preliminary

injunction not be granted. Fourth, the Court must weigh whether granting preliminary injunction will or will not disserve the public interest. Fifth, the Court is directed to address the balance of equities and see if they favor the injunction. Sixth, the Court is directed to consider whether the injunction will preserve the status quo, preserve what exists now, pending a trial on the merits of the case so that things will stay the same. And then the Supreme Court says you can't prove five or four, you have to prove all six. So that's what we are talking about here today, and that is the area in which the Court must base its ruling.

The plaintiffs are individuals and three home rule cities who have asked the Court to delay the effective date. So it is they who bear the burden of proving these things established by *Rathke versus MacFarlane*. They must show the threshold of urgent necessity, and then they must show to the satisfaction of the Court these other six things that have been discussed.

In large measure, the proof which has been offered has been focused on their position that Amendment 2 is repugnant to the United States Constitution. They argue that there's a urgent necessity because of the probability of persons having their fundamental constitutional rights violated for any time period creates an urgent necessity. They argue that the violation of these fundamental constitutional rights causes irreparable harm, and so on, through the six that I have to weigh.

The first one, and perhaps the one that most of the attention has been based on is whether -- has been focused on, rather, is whether there's a reasonable probability of success on the merits. Plaintiffs are attacking the part of the Constitution of the State of Colorado which was passed by a majority vote of the voters November 3, 1992. Because it is a part of the Constitution, they must prove at the final hearing in order to prevail that this Amendment is unconstitutional beyond a reasonable doubt.

Several cases have said it that that's the standard, including *Rathke versus MacFarlane*. That's the highest standard we have in Colorado. That's the same standard as a jury would be asked to consider if someone is guilty of murder in the first degree. Reasonable doubt in Colorado means a doubt based upon reason and common sense which arises from a fair and thoughtful consideration

of all of the evidence or the lack of evidence in the case. It is not a vague, speculative, or imaginary doubt, but it is such a doubt as would cause reasonable persons to hesitate to act in matters of importance to themselves. And so at the hearing on the merits, they will have the burden of proving it beyond such reasonable doubt.

Plaintiffs argue that this Amendment deprives them of fundamental rights guaranteed by the U.S. Constitution. They do not argue that there is a fundamental right to be homosexual or bisexual or lesbian, which is found in the U.S. Constitution. Rather, they argue that the rights they are deprived of are found in the right to equal protection of the laws under the First and 14th Amendments to the United States Constitution.

Specifically, plaintiffs argue that they will be denied the right to vote and the right to petition the government for redress of grievances by the right to have access to the courts. What does the Amendment say? We have had the Amendment on the podium from time to time here. It says, "Neither the state of Colorado through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities, or school districts shall enact, adopt or enforce any statute, regulation, ordinance, or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status, or claim of discrimination. This section of the Constitution shall be self-executing."

Plaintiffs produced evidence that the Amendment was only addressed to claim of discrimination by homosexuals, lesbians, and bisexuals. They did this by the testimony of witnesses who came before this Court and announced, self-declared, if you will, that they were homosexual. And then by saying that neither they or anyone that they knew who were also homosexual are seeking to establish any minority status or quota preference or protected status.

By doing this, the plaintiffs have attempted to narrow the focus to the claim of discrimination based on homosexual, bisexual, or lesbian orientation. They therefore urge that the Amendment actually and only stands for the proposition in Colorado by Constitutional Amendment is now about to say that there will be no remedy available for acts of discrimination against homosexuals, bisexuals,

and lesbians because those people alone may not go to the government to ask for laws to be enacted or existing laws to be enforced which would prevent that discrimination.

They then point out both by testimony and exhibits that there are existing laws. And they pointed specifically to Section 10-3-1104 having to do with insurance. And that says insurance companies may not discriminate in issuing insurance policies based on sexual orientation. They point out that the executive department has an existing order by virtue of the Governor's Executive Order of December 10, of 1990, which prohibits discrimination based on sexual orientation. They point out from the testimony of the representatives of the home rule cities that these cities may not enact ordinances which may grant remedies for discrimination based on these particular orientations. And they further point out that the three cities which have such ordinances at the present time will be forbidden to enforce them if Amendment 2 becomes effective.

They urge that school districts may not be allowed to remedy any discrimination as to faculty employees or students based on discrimination for homosexuality, bisexuality, or lesbians. In short, the plaintiffs urge that this Amendment, by denying the opportunity to obtain a remedy for discrimination based upon these orientations, has identified a specific group and said that any discrimination as to that group because of membership in that group may not be given relief or remedy by the agencies of the state of Colorado.

It has not said that the state will discriminate against homosexuals, bisexuals, or lesbians, but it has said if any private citizen does discriminate based on such orientation, that no remedy may be provided by the State. Plaintiffs argue this Amendment endorses and gives State-approval as to private discrimination.

Plaintiffs argue that such a State statement endorsing and approving private discrimination deprives them of the right to vote and the right to approach their government; specifically, their courts, for a redress of greivances.

Plaintiffs offer much case authority in support of their position. Many cases from the United States Supreme Court. Such law is received and followed where appropriately applicable by Colorado courts from the United States Supreme Court. Plaintiffs offer several

other cases which are not controlling in Colorado. For example, they offer cases from other states. California, for instance, and from federal courts which are not Supreme Court. That's proper. There's nothing improper about that. They are not saying it is controlling here. They are saying please read this and please review this, we believe there is wisdom to be gained which Colorado might wish to adopt.

Their lead case and where they began, and this was highlighted in the closing argument yesterday, is *Reitman versus Mulkey*. That case involved a question of race in the sale or leasing of rental property.

Let's turn now to the defendants. The defendants, quite rightly, point out that the majority of cases offered by the plaintiffs deal with race, as does *Reitman versus Mulkey*, and not with questions of sexual orientation. The Court notes that defendants are right. That's correct. But the Court also notes it wasn't very surprised by that. And the reason it wasn't very surprised by that is because the history of discrimination law in the United States is based on race. It started with the 14th Amendment which talked about slavery. And most, I will say, of the law has dealt then with the history of discrimination. And so most of these cases do talk about race. Race has a very special place in our legal history. And I think it may well have a small place here.

There has been a suggestion that as a part of Defendant's Exhibit C, one of the things that concerned those proponents of Amendment 2 was that there was urged in one jurisdiction in Colorado that a certain quote preference be given to those with homosexual/bisexual orientation. It was never adopted, but they suggested that perhaps that is what is being addressed by the quota preference which is a part of Amendment 2.

Now, defendants are allowed to present evidence, and defendants are allowed to argue. And they have done both here. But *Rathke versus MacFarlane* does not place any burden of proving anything on the defendants. The burden is always with the plaintiffs who are seeking the injunction. Now, in addition to not having to prove anything here, the defendants have the benefit of something else. Legislation in this case, this is a piece of initiated legislation that will become a part of the Colorado Constitution, is entitled to something

called a presumption of constitutionality, and the Court understands that and gives to that statute a presumption of constitutionality.

That is not to say that the presumption may not be overcome by the presentation of evidence, but the defendants start with that presumption. Defendants then well and fairly argue there are several things here that have been discussed that have been presented that they strongly urge are not part of the case. Mr. Dailey did this very well, really, at the upfront part of his argument yesterday. He said Coloradans for Family Values isn't a party here. He said the Religious Right isn't a party here, nor the Political Right, nor whether Colorado could be deemed a hate state. That's not here, Judge. That's not what you are to decide. And the defendants are correct, and the Court accepts that.

As a matter of fact, I looked at what was presented to the Court in terms of the efforts that have been made on the part of Coloradans for Family Values and the Religious Right and the Political Right. And what I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied for or were part of a lobbying effort for the passage of the Amendment, and that involved spending money and presenting their views.

There is absolutely nothing wrong with that. As a matter of fact, that is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been involved with that process, because they have followed exactly what democracy urges. As a matter of fact, at every election, what you hear is to the voters, "Get involved. Go to your caucuses. Vote." That's exactly what they have done. There's nothing suspect about that.

The focus of the defendant's argument was that this is not unconstitutional because all the Amendment attempts to do is to make a part of Colorado law that which is existing in the federal law in terms of the treatment of homosexuals, lesbians, bisexuals. The argument goes on that the courts should not look to the limitation placed by plaintiffs just on the discrimination but rather look to the

whole Amendment. And they urge that because that demonstrates the true intent of the Amendment. If you isolate on one part, you may not be viewing the true intent and that the Courts should look to the ballot analysis as a type of legislative history, if you will, to demonstrate what that intent was.

The defendants also argue, and they cite the same way, U.S. Supreme Court cases and cases from other courts. They start with *Bowers versus Hardwick*, and they urge that gay, lesbian, and bisexual conduct has been held -- "conduct," now, has been held to be criminal in some states. That case involved a statute outlawing sodomy. And that statute was sustained in *Bowers versus Hardwick* by the United States Supreme Court. And they urge that this behavior which can be criminalized defines the class of people here.

They also argue that a law-making procedure that disadvantages a particular group does not always violate constitutional rights or deny equal protection, and they cite Supreme Court case law for that. The Court agrees with that general statement of the law. They say there is no necessity for the Court to intrude on the private and moral values of citizens, and that is what is the heart of Amendment 2.

They urge then that the Court distinguish between certain standards or measures or tests, if you will, as to how you -- how the Court should view an attack on constitutionality. They say this should not be viewed under what is described as the strict scrutiny test but only should be described or analyzed under what's called the rational basis test.

There are the positions which have been taken in summary form by the two sides here. The question is what is the Court to do. First, the Court is ruling on a motion for preliminary injunction only. I am not ruling on the constitutionality of Amendment 2. As a matter of fact, the Court may not at this time rule on the constitutionality of Amendment 2. I may only rule on what is before me, the motion for preliminary injunction.

Second, in ruling, I am following the guidelines that I have outlined from *Rathke versus MacFarlane*. The Court's view is this: In large measure, everything revolves around the first of the six claims. That is -- first of the six elements, excuse me, as to whether plaintiffs have shown evidence and made argument that leads this

Court to conclude that they have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt at a hearing on the merits.

Now, some of the six parts are easier to answer on that score than others. For example, the last one is the easiest. Will an injunction preserve the status quo? Yes, of course. Amendment 2 has never been a part of the law of Colorado. It is not now. An injunction will preserve exactly that status. The voters have voted on it. The Secretary of State has certified the vote totals. An injunction will preserve exactly that status.

The others tend to be related to that question that the Court has identified. Is there a danger of real, immediate, and irreparable harm if Amendment 2 becomes effective? Well, if the Court determines that this would be a denial of fundamental constitutional rights, then any denial of fundamental constitutional rights would be real, immediate, and irreparable harm.

Keep in mind where I started. Rights come first in the Colorado Constitution. Bill of Rights is first. The question relates to whether Amendment 2 amounts to a denial of a constitutional fundamental right. Is there a plain, speedy, and adequate remedy at law? Well, once again, it's related to is this probably to be shown to be unconstitutional? The only discussion of potential remedy has been that someone could pass an amendment which repeals Amendment 2. That is a plain remedy. Plain isn't enough. Is it speedy? Clearly not.

There would have to be some effort to get that sort of an amendment on a ballot by legislative action or initiative. Then there would have to be the election process. There's a plain remedy, but it is clearly not speedy. But it does relate, once again, as I have mentioned to whether or not this is a violation of fundamental constitutional rights, or that they have shown that they have a reasonable probability of succeeding on the merits.

Will the granting of a preliminary injunction serve or disserve the public interest? It's tied to whether or not they have established whether they may or may not prevail. The Court finds that the public has no interest whatsoever in having an unconstitutional amendment be added to its Constitution. By the same token, or, if you will, on

the other hand, the State has every interest in having a constitutional amendment become effective if it is not unconstitutional because a majority of the voters voted for it.

Does the balance of equities favor the injunction? It goes back to the same question. Is there an urgent necessity? The urgent necessity is once again tied to whether or not they are liable to prevail. Therefore, the Court concludes that in or order to answer the question as to whether plaintiffs have established the reasonable probability of success, reasonable probability that they will prove this is unconstitutional beyond a reasonable doubt will determine the matter.

What is the state of the law in this Court's view regarding constitutionality of such an amendment? It has been mentioned that the law is not static. It has been mentioned that it evolves. It grows. It changes. And that is true. I'm going to borrow a few words from some Justices of the Supreme Court. It's not about these cases. Not about sexual orientation. It's about the law. It's about the law growing and changing, because I want to put this in a context. Quoting from Mr. Justice McKenna in a case called *Weems versus the United States* from a long time ago, 1910. He said, "The clause of the Constitution in the opinion of the learned commentators may be, therefore, progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

I want to quote from Chief Justice Earl Warren in a 1958 case called *Trop versus Dulles*. He was discussing the 8th Amendment, that's cruel and unusual punishment. It says, "The words of the 8th Amendment are not precise and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

What is the law on discrimination? What has it been? As I mentioned it started with the 14th Amendment which was for former slaves. It relates to blacks. It related to race. It has been largely dominated by racial cases. The evolution has developed some legal standards, and they were argued yesterday, and I'm going to now discuss those.

One, is that a violation which involves something -- violation of a fundamental right which involves something called a suspect class or a violation which involves a suspect class, even if it's not a fundamental right, calls for strict scrutiny by the Court. It's not here. Plaintiffs haven't argued it. It's not for the Court to determine. Go on to the next.

A second involves what are described as equal protection violations of fundamental rights. What are fundamental rights? There have been a lot of cases that have discussed those. Fundamental rights have been deemed to include the right to participation in elections. The right of access to the courts. Right of privacy. And even the right of interstate travel. In terms of this issue, the laws which may burden fundamental rights of an independently identifiable group are subject to what is called strict scrutiny of the courts under this equal protection analysis.

That's where the plaintiffs urge the Court ought to come down. Those two prongs. This is a fundamental freedom. This is an independently identifiable group. And therefore, the Court must view this under the strict scrutiny standard. What does that mean? That means a law which burdens any of these fundamental rights of this independently identifiable group will require the state now to show and have a burden that this measure is necessarily related to a compelling governmental interest.

So it changes. They have had all the burden here, but if it were a strict scrutiny standard at the time of hearing on the merits, there would be two standards. One on this side of the room and one on that side of the room. And plaintiffs urge that is the standard I should apply.

The third standard which has been urged in part at least by the defense is called the rational basis test. And that involves laws which may involve not fundamental rights but may be something that's deemed non-fundamental rights in the Constitution, and they are subject only to the test of rational basis. That is to say, the Court is to defer to the legislation if there is any rational relationship between a legitimate public goal to be accomplished and the lines drawn which may accomplish that, even though those lines in the legislation may amount to some degree of discrimination.

The Court concludes with regard to the first that there is a fundamental freedom involved with Amendment 2. The parties themselves have struggled to identify the fundamental freedom. The reason they have struggled, I think, is because they have tried to cast it in the words of prior cases. Let me read you some of those words. I'm going to read you some quotes, and that's always a question as to whether anybody ought to do this, but you have to understand where the Court is coming from because of the law that has come before it.

The first case that the plaintiffs cited is called *Reitman versus Mulkey*. And it was a California case. You haven't read it, but it involved a Section 26 that they passed out there, and it said if you own a piece of property, you can decide if you want to sell it or lease it to anybody, and it's you own decision. That's all it said. The Court said private discriminations in housing were now not only free from prior statutory enactments, but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke constitutional authority, from from sensor or interference of any kind from official sources.

The Court in 1967 by a five to four vote, there are nine justices on the United States Supreme Court, said that was unconstitutional. That involved a fundamental right because what it did was it took this private discrimination and it gave state support to it. But it was five to four in 1967. That means the majority said, yes, and it was the law of the land.

But what happens if we change the members of the Supreme Court? I've told you the law evolves. So let's come forward from 1967. In 1984 there was a Supreme Court case which has been urged to the Court by both sides, as a matter of fact, called *Palmore versus Sidoti*. I don't know if that's how you pronounce it. That's how it looks. This time it was a unanimous decision, nine-zero. And it didn't involve real estate at all. It involved child custody. And the facts of that were that two people who were Anglo had been married, and they had a baby. And then they got a divorce. And in the

divorce, custody of the baby was awarded to the mother. And the mother, who was an Anglo, then took up with a black man. And they ultimately married. And the father who was Anglo went for a change of custody. And basically, the change of custody said my daughter is white, and she will be victimized because there will be bias focused on her because the two people she's living with are of a mixed marriage. One white, one black. That's the context.

The Supreme Court said the question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. Seventeen years before the vote had been five to four. This time it's unanimous. And the Supreme Court says we have little difficulty concluding we are not -- and then it gives a footnote. Sometimes a lot of law is contained in the footnotes, and the footnote says, "In light of our holding based on the equal protection clause, we need not reach or resolve petitioner's claim based on the 14th Amendments of due process clause."

So they are ruling on equal protection which is being raised here. The Court then goes on to say the Constitution cannot control such prejudices. That is, private prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect.

Two years ago in 1991, there was a case which was not from the Supreme Court, it's been urged -- as a matter of fact, it was urged in closing argument by defense. It's called *Pruitt versus Cheney*. Different set of facts. A lesbian was an officer in the Army Reserve. She made a statement which was printed in the Los Angeles Press that said, "I am a lesbian." Based upon that, she was thrown out of the military. They have a regulation, an Army regulation that says they can do that. She brought suit to say that's unconstitutional. And she brought it because she said it's a violation of my right to freedom of speech. The only reason I was thrown out is because I spoke and it got printed in the paper. That's why you threw me out. Not because I'm homosexual.

The Court said no, you were thrown out because of the Army regulation because you are a homosexual, and that had been her claim. But then the Court incredibly said your claim was for violation of First Amendment but you stated facts which may arise --

may amount to a violation of the equal protection clause, and even though you didn't raise it by stating the theory, we are going to let you proceed on that theory which you didn't state. An incredible swing.

It cited the *Palmore* case I just read to you. In *Palmore*, the Supreme Court struck down a denial of custody of a child, based on social disapproval of the interracial marriage, of her daughter. In so ruling, the Court said the Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect.

Then it went on to say, *Cleburne*, which is another case, made clear that this principle is not confined to instances of racial discrimination reviewed under strict scrutiny. *Cleburne* was a case of zoning, basically. And it was whether you could put a group home for mentally retarded people within a certain area. And in *Cleburne*, the Court said it is plain that the electorate as a whole, either by referendum or otherwise, could not order city action violative of the equal protection clause.

And then they cite a case called *Lucas versus 44th General Assembly of Colorado*. It's a Supreme Court case. And the city may not avoid the strictures of that clause by deferring to the wishes or objections of some fraction of the bodied politic, and quote *Palmore*, the same language I have quote before.

So the first part has been established, the Court concludes. There is a fundamental right here, and it's the right not to have the State endorse and give effect to private biases.

Second question, is there an identifiable class? Yes. Lot of these cases says it's real hard to find an identifiable class. Not here. The statute itself, the Amendment 2 defines the identifiable class. A lot of these cases say even though it is facially neutral; that is to say, you can sell your property to anybody you want or not sell it to anybody you don't want, this isn't facially neutral. This identifies the class right in the Amendment.

So I find that there is an identifiable class. Now, with regard to the idea that's been argued by defendants that you can't make this an

identifiable class because of *Bowers versus Hardwick*, the Court concludes that this is principally, although, the term "conduct" appears in there, this is principally an Amendment which addresses status, not conduct. Conduct is what *Bowers versus Hardwick* said.

I do that based on a case which was not cited by either side. It's called *Robinson versus California*. That case is a Supreme Court case. That case said you can't make a status a crime even though the conduct is a crime. It had to do with drugs. Can you prevent -- can you say it's a crime to possess drugs? Yeah. Sell them? Yeah. Can you say it's a crime to be addicted to drugs. That's the status. And they said no.

The Court finds that this is a status. Therefore, the Court finds that the burden at the hearing on the merits is going to be twofold. One, the plaintiffs must prove the unconstitutionality of this beyond a reasonable doubt. But two, the Court will look at this under the strict scrutiny standard. And therefore, the State will have to show more than a mere rational basis. They will have to show a substantial and compelling government interest in passing this.

There will be a trial on the merits. The amendment will be reviewed as though it is one involving a fundamental right as affecting an identifiable class. That requires strict scrutiny and the two burdens. This will take place in light of what Justice Warren said, "The evolving standards of decency that mark the progress of a maturing society."

Will the plaintiffs win? The Court does not know. Do the plaintiffs have a reasonable probability, given all of this, given all of the law that the Court has examined, do they have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt? Yes.

The burdens of *Rathke* have been carried and met by the plaintiffs. The motions for preliminary injunction are granted, and the defendants -- the defendants, the Governor of the State of Colorado and the Attorney General of the State of Colorado are enjoined from declaring Amendment 2 in force, and are enjoined from enforcing Amendment 2 until further order of Court.

This Court is in recess.

(The proceedings were concluded.)

REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity as Official Reporter for Division 19, District Court, Denver, Colorado, at the place above set forth.

Dated at Denver, Colorado, January 22, 1993.

_____

Karen Ann Shain, RPR, CSR

APPENDIX F

AMENDMENT 2 – CONSTITUTIONAL AMENDMENT INITIATED BY PETITION

No Protected Status

Ballot Title: *An amendment to Article II of the Colorado Constitution to prohibit the state of Colorado and any of its political subdivisions from adopting or enforcing any law or policy which provides that homosexual, lesbian, or bisexual orientation, conduct, or relationships constitutes or entitles a person to claim any minority or protected status, quota preferences, or discrimination.**

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would:

-- prohibit the state, its branches or departments, or any of its agencies, political subdivisions, municipalities, and school districts from adopting or enforcing any law or policy that entitles any person to claim discrimination, protected status, minority status, or quota preferences based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships; and

-- make all existing anti-discrimination ordinances, laws, regulations, and policies prohibiting discrimination based on an individual's homosexual, lesbian, or bisexual orientation unenforceable and unconstitutional.

Definitions

For the purposes of this analysis, the following terms have the given meanings:

-- "**Civil rights laws**" refers to local, state, and federal laws designed to protect classes of persons from discrimination in areas such as employment, housing, and public accommodations.

-- "**Constitutional rights**" refers to the guarantees contained in the federal Bill of Rights (first ten amendments to the United States Constitution) and made applicable to the states through the Fourteenth Amendment.

-- "**Discrimination**" as commonly used in civil rights law, means any act which denies, prevents, or limits any person from obtaining or maintaining employment, housing, or public accommodations based on race, age, gender, disability, nationality, or religion. Some states and localities have extended similar protections against discrimination based on factors such as marital or familial status, military status, sexual orientation, or political affiliation.

-- "**Equal protection**" refers to the clause in the Fourteenth Amendment to the United States Constitution which prohibits any state from adopting any law which denies the equal protection of the laws guaranteed to the citizens of the United States.

-- "**Political subdivision**" generally refers to a county, municipality, school district, local junior college district, special district, water conservation district, cooperative agency, regional commission, or an Indian tribe organized pursuant to the federal "Indian Reorganization Act of 1934," as amended.

-- "**Protected status**" means that a group has been identified for protection from actions which affect a protected or suspect class and which are limited or scrutinized as required by anti-discrimination statutes, ordinances, or common law.

-- "**Quota**" refers to a remedy which imposes numerical goals to correct past discriminatory employment practices.

-- "**Sexual orientation**" means the status of an individual as to his or her sexuality, for example, heterosexuality, homosexuality, lesbianism, or bisexuality.

Background

The proposed amendment arises in the context of three decades of increased governmental activity in the areas of civil rights. The concepts of the federal Civil Rights Act of 1964 have been extended by Congress, the states, and local governments which have enacted new laws and strengthened existing laws to prohibit discrimination in employment, housing, access to public accommodations, and other areas involving civil rights. Courts at all levels are involved in interpreting and applying these laws, and administrative agencies have been created to enforce some of them. The proposed amendment identifies one area -- discrimination based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships -- in which civil rights laws and policies could **not** be enacted or enforced by the state government or by local governments in Colorado.

Evidence of discrimination. There is disagreement concerning the extent of discrimination against homosexuals, lesbians, and bisexual persons. Discussions with public agencies which maintain records on such discrimination complaints reveal that these individuals have been found to experience discrimination in access to employment, housing, military service, commercial space, public accommodations, health care, and educational facilities on college campuses. For example, of the 50 complaints reported to the Denver Agency for Human Rights and Community Relations in 1991, twenty-three were incidents of discrimination based on sexual orientation. Approximately 61 percent of these reports dealt with employment discrimination. Since 1988, the Boulder Office of Human Rights has investigated ten incidents of discrimination based on sexual orientation. Four of the complaints lacked sufficient evidence to be considered discrimination based on sexual orientation. It is generally recognized that discrimination complaints often go unreported because individuals fear the repercussions and further victimization associated with disclosure of their sexual orientation.

Current Laws and Policies

Presently, a patchwork of federal, state, and local laws, regulations, and policies are in effect which monitor, offer limited protection against, or prohibit discrimination based on sexual orientation.

Local ordinances. Three home rule cities -- Aspen, Boulder, and Denver -- have ordinances protecting individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation. None of the ordinances requires quotas, affirmative action, minority status or requires that employers or landlords seek out homosexual, lesbian, or bisexual employees or tenants. These cities have determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations.

Aspen's ordinance prohibits discrimination in the areas of employment, housing, and public accommodations because of race, creed, color, religion, ancestry, national origin, sex, age, marital or familial status, physical handicap, sexual orientation, or political affiliation. The Aspen ordinance does not exempt religious institutions. In Boulder, religious institutions cannot refuse to hire an individual or restrict access to public accommodations or housing because of that person's race, creed, color, gender, sexual orientation, marital or familial status, pregnancy, national origin, ancestry, age, or mental or physical disability. The Denver ordinance entirely exempts religious institutions, thus allowing them to refuse to hire persons or restrict access to public accommodations or housing based on a person's sexual orientation.

In Boulder, the owner of an owner-occupied, one-family dwelling or duplex is not permitted to deny housing to an individual based on his or her sexual orientation. However, the ordinance does allow owners to limit renters or lessees to persons of the same sex. In Denver, owners with rental spaces in their homes or duplexes (in which they reside) are exempted from the ordinance.

The anti-discrimination laws in these three cities do not classify homosexual, lesbian, or bisexual persons as ethnic minorities, but instead outlaw discrimination based on sexual orientation. These laws banning discrimination based on sexual orientation also prohibit discrimination against heterosexual individuals as well as against homosexual, lesbian, and bisexual persons. Attempts to pass similar anti-discrimination ordinances based on sexual orientation were defeated in Colorado Springs and Fort Collins. In addition, Denver Public Schools has adopted a nondiscrimination policy prohibiting discrimination based on sexual orientation.

State laws and policies. In 1990, the Governor issued an executive order prohibiting discrimination based on sexual orientation in the hiring, promotion, and firing of classified and exempt state employees. The order applies to executive departments and to state institutions of higher education. Metropolitan State College of Denver has a policy prohibiting college sponsored social clubs from discriminating in membership on the basis of sexual orientation. Colorado State University has a general nondiscrimination policy prohibiting discrimination based on sexual orientation. Conversely, the University of Colorado board of Regents defeated a resolution prohibiting discriminatory practices based upon sexual orientation. The only Colorado statute offering protection based on sexual orientation prohibits health insurance companies from determining insurability based on an individual's sexual orientation. Legislation was defeated in 1991 which would have expanded Colorado's ethnic intimidation law to include the right of every person, regardless of age, handicapping condition or disability, or sexual orientation, to be protected from harassment. Recently, the Colorado Civil Rights Commission voted to recommend that the state's civil rights law be amended to prohibit discrimination based on sexual orientation.

Federal laws. There are no federal civil rights laws that protect persons from discrimination based on sexual orientation in the areas of housing, employment, or public accommodations. However, the federal Hate Crime Statistics Act of 1990 requires the United States Attorney General to monitor, in addition to other crimes, those crimes that manifest evidence of prejudice based on sexual orientation.

Laws and policies in other states, municipalities, and higher education institutions. Anti-discrimination laws and policies based on sexual orientation are not unique to Colorado. Six states (Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, Wisconsin) and the District of Columbia, and approximately 110 cities and counties in 25 states have passed legislation protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation in employment, housing, and public accommodations. In contrast, the voters in Oregon will be considering an initiated measure, which among other provisions, would outlaw legislation aimed at protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation. In 1988, the voters in Oregon overturned an executive order that would

have protected homosexual individuals from discrimination in state government.

Governors of eight states besides Colorado (California, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington) have issued executive orders prohibiting discrimination in state employment based on sexual orientation. Nationally, around 65 college and university systems have issued non-discrimination statements protecting heterosexual, homosexual, lesbian, and bisexual persons.

Impact of the Proposal

Passage of the amendment would make unenforceable and unconstitutional those ordinances which prohibit discrimination based on sexual orientation with regard to homosexual, lesbian, and bisexual persons. Therefore, the portion of those ordinances prohibiting discrimination based on sexual orientation adopted by the city council or approved by the voters in the cities of Aspen, Boulder, and Denver would be rendered invalid. In addition, the amendment would nullify existing anti-discrimination policies based on sexual orientation which have been adopted by any state branch of government, department, agency, or school district in Colorado and would prevent adoption of any state statute, local ordinance, or policy for public entities which prohibits discrimination based on sexual orientation. The amendment would not affect the anti-discrimination policies based on sexual orientation that have been adopted by numerous private employers. However, the amendment does not address the rights of heterosexual individuals to bring claims of discrimination under existing or future ordinances, therefore the impact of the amendment on the rights of heterosexuals is not known.

Arguments For

1) There is no evidence that homosexual, lesbian, and bisexual individuals are sufficiently disadvantaged to warrant designation as a protected class. Protected class status is not a basic right guaranteed to all citizens by the United States Constitution. In general, protected class status has been afforded to groups which have historically been subjected to purposeful unequal treatment, or relegated to such a

position of political powerlessness as to command extraordinary protection from the majoritarian political process, or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. Some groups which have been given protection are those identified because of national origin, culture, age, disability, gender, religion, and marital or familial status. Similarly, there are no organized, state-sanctioned legal barriers which deny their ability to participate in the political process as has been the situation faced by racial minorities, in particular. For these reasons, it appears that this amendment may pass constitutional muster.

2) Homosexual, lesbian, and bisexual persons do not require protected status because they are entitled to recourse under the tort laws for libelous or slanderous abuse, wrongful discharge, emotional distress, or similar theories. Since homosexual, lesbian, and bisexual persons cross all cultural lines they may already receive protections with regard to race, gender, age, ethnicity, disability, religion, or marital or familial status. Insufficient evidence exists for creating a legal cause of action by homosexual, lesbian, and bisexual individuals in employment, housing, and public accommodations to warrant adding sexual orientation as a protected class.

3) Granting protected status to homosexual, lesbian, and bisexual persons may compel some individuals to violate their private consciences or to face legal sanctions for failure to comply. For some individuals, homosexuality, or bisexuality conflicts with their religious values and teachings or their private moral values. If a landlord is required to rent an apartment, for example, to homosexual, lesbian, or bisexual persons, he or she may be asked to either condone a lifestyle of which they do not approve or to be in violation of a local ordinance. People and institutions should have the right to express and act upon their moral convictions without being accused of discrimination.

4) The amendment does not have a negative impact on home rule autonomy of Colorado cities nor does it intrude into traditional powers of local government. The Colorado Constitution guarantees local municipalities the ability to function legislatively only in municipal affairs. Civil rights issues are not normally considered by local governments. Because of the importance of these issues, a wider spectrum of individuals than just municipalities should consider these matters. Consideration of individual and group civil rights on

the municipal level sets an improper precedent and only serves to dilute the original purpose of legislation enacting civil rights protections.

5) A proliferation of local ordinances or the possibility of a state statute that would provide protected status for homosexual, lesbian, and bisexual persons may divert resources for current enforcement activities. Additional discrimination cases may produce a demand for more staff and other state and local resources to investigate complaints, resolve disputes, or litigate cases.

Arguments Against

1) All individuals should be accorded the same basic dignity, right to privacy, privileges, and protections guaranteed to every citizen. Discrimination against any class of individuals is wrong and, if tolerated, can easily spread to any and all groups in our society. In a pluralistic society, a threat to the rights of any one group should be viewed as a threat to the rights of all citizens. The amendment deprives homosexual, lesbian, and bisexual persons of legal protection against discrimination based on sexual orientation by isolating them as a class which could not be protected by such civil rights laws. Civil rights laws are constantly evolving to meet the demands of society, and no group of people should be precluded from seeking civil rights protection or protection from discrimination. Civil rights laws prohibiting discrimination against homosexual, lesbian, and bisexual persons do not condone or encourage homosexuality or bisexuality; rather, they only condemn discrimination of any nature and ensure equal opportunity for every citizen. By eliminating legal protections, the amendment sanctions prejudicial acts against homosexual, lesbian, and bisexual persons.

2) Because homosexual, lesbian, and bisexual persons face discrimination in employment, housing, and public accommodations and are victims of hate crimes, civil rights laws are needed that prohibit discrimination based on sexual orientation. Without the ordinances, existing laws inadequately protect these individuals and fail to address discrimination in employment, housing, and public accommodations. Homosexual, lesbian, and bisexual individuals belong to all economic classes and are members of all racial, ethnic, disability, age, and religious communities. Because the kind of

discrimination that these individuals experience is solely connected to a person's sexual orientation, the added protection in the ordinances gives homosexual, lesbian, and bisexual individuals legal recourse should they be discriminated against on the basis of their sexual orientation.

3) The amendment attacks home rule autonomy and intrudes into the traditional powers of local governments and political subdivisions with respect to civil rights. Two-thirds of all Coloradans live in home rule cities. Under the Colorado Constitution home rule cities are empowered to address the needs of their residents as they see fit. This amendment also undermines county powers and the ability of the executive branch of government, school districts, and political subdivisions to enact their own anti-discrimination policies on this issue. The amendment implies that governmental entities, including the state, counties, cities, school districts, and other political subdivisions, should not be trusted to decide whether or not to protect persons from discrimination based on sexual orientation.

4) Ensuring the civil rights of any person, whether for age, gender, race, disability, religion, sexual orientation, marital or familial status, does no more than protect persons from discrimination and guarantee their basic human rights. The amendment is misleading and prejudicial by implying that homosexual, lesbian, and bisexual persons are seeking "minority status" or "quota preferences." Instead, the current local ordinances protect the right to get a job, buy a house, or have the same access to public accommodations as every other citizen. Each of these local ordinances also bans discrimination on the basis of age, gender, disability, religion, and marital or familial status, which are factors that are unrelated to whether a person is a member of a racial or ethnic group.

5) By singling out homosexual, lesbian, and bisexual persons in the state constitution and effectively denying them potential remedies for discrimination, the amendment denies them the same equal protections under the United States Constitution as other citizens. The proposed amendment may violate the equal protection clause of the United States Constitution, which prohibits any state from adopting a law which singles out a group for unfavorable or discriminatory treatment without a sufficient basis, or due to prejudice or irrational fears. For example, those city ordinances barring discrimination on the basis of sexual orientation could still be

applicable to heterosexual individuals bringing claims of discrimination based on sexual orientation in housing, employment, and public accommodations, but not to homosexual, lesbian, and bisexual persons. Arbitrarily discriminating against any class of individuals in employment decisions based on sexual orientation is a violation of equal protection laws. Further, it is also a violation for a state to adopt a constitutional amendment which arbitrarily discriminates against homosexuals.